Supreme Court of the United States

No. 72-5581

RICHARD GUY STEFFEL,

Petitioner,

—v.—

JOHN R. THOMPSON, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Civil Docket 14260

Jury demand date:

INJUNCTION

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center

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(Hudgins & Reynolds)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 10-16-70	Clerk	15.00	Oct. 16, 1970	American Civil Liberties Union of Ga.	15.00	
J.S. 6 3-24-71	Marshal	19.80	Oct. 19, 1970	Treas. U.S. Dep.	.35	15.00
Basis of Action: Complaint for declaratory & injunctive relief—to declare unconstitutional Ga. Code Annotated Sec. 26-1503 (Acts 1968, pp. 1249 et seq.), etc. (rt. to handbill & protest War in Vietnam): gtd. by U.S. Constitution.	Docket fee	5.00				
	Witness fees					
	Depositions					

DOCKET ENTRIES

DATE	PROCEEDINGS
1970	
Oct. 16	Complaint for declaratory and injunctive relief (class action), (with Exhs. A, B & C), praying for temporary restraining order, for preliminary & permanent injunction, and to declare Ga. Code Ann. Sec. 26-1503 unconstitutional as applied to pltfs.' first amendment activities, etc.—filed. Summons issued & delivered to Marshal.
	Hearing set on matter of temporary restraining order for Tues., 10-20-70, at 4:00 P.M. at Rome, Ga. (Parties advised) rms
20	Above hearing not had; reset for Wed., 10-28-70 at 10 A.M. in Atlanta. (Parties present when reset)

DATE	PROCEEDINGS
Oct. 20	Pltfs.' motion for a temporary restraining order, with affidavits of SANDRA LEE BECKER, WILLIAM R. GIGNILLIAT, III, and brief in support of motion—filed. rms
26	Brief of defts. Thompson & Hand in opp. to mot. for t.r.o, filed. mjw
27	Brief in support of pltfs' motion for preliminary & permanent injunction & declaratory relief, filed. To AJH by counsel. jwe
28	Marshal's returns of service as to John R. Thompson & F. D. Hand, executed 10/21/70; as to D. Scott Hudgins, Jr. & G. T. Reynolds, executed 10/22/70. hds
	HEARING: Pltf's petition for temporary restraining order. Counsel for parties entered into certain stipulations. Stipulations, filed. CASE SUBMITTED TO COURT. pwm
27	Brief of defendants, filed. To AJH. jar
Nov. 2	ANSWER of defts. THOMPSON & HAND, filed. To AJH. jwe
	Supplementary brief of defts. THOMPSON & HAND, filed. To AJH. jwe
9	ANSWER of defts HUDGENS & REYNOLDS, filed. To AJH. jar
19	steno notes of procedings had 10-28-70, filed jfe
Dec. 4	Pltfs. motion for temporary stay of proceedings and brief, filed. To AJH. jwe
1971	
Jan. 8	ORDER staying pltfs. prayers for injunctive & declaratory relief pending the decision of Supreme Court in the following cases, Samuels vs. Mackell, Dyson vs. Stein, Pacific Indemnity Co. vs. Acel Delivery Service, Inc. & O'Hair vs. Paine; case is stayed until further order of the Court, filed. (Copy to counsel) pwm

DATE	PROCEEDINGS
Jan. 19	Pltfs' motion for a decision, with brief, filed. To AJH. jwe
	ORDER denying pltf's motion to vacate Courts prior order staying all further procedings, filed. (Copy to counsel). To AJH. pwm
Mar. 19	Order DENYING pltfs' prayers for injunctive & declaratory relief, filed. jwe
24	JUDGMENT filed & entered that the pltfs. take nothing, that the action is hereby dismissed, and that the defts. recover of the pltfs. their costs of action. jwe (Copy of order & judgment to counsel). jwe
	Transcript of proceedings had 10-28-70 received from AJH & filed. jwe
Apr. 23	Pltf's. (Richard Guy Steffel) Notice of Appeal, with motion for leave to appeal in forma pauperis, affidavit of poverty, and
	Order allowing said pltf. to prosecute appeal in forma pauperis, filed. (Copy to counsel & U. S. Court of Appeals). jwe
May 27	FILE MAILED TO U.S.C.A. with exhibits via registered mail RRR. (Ack). jfe
1972	
July 31	Certified copy of judgment from USCA *affirming* judgment of USDC with copy of Opinion, filed. Copy to counsel. (file & exhibits returned) lkn
1973	
Mar. 20	Pltfs' request to transmit and file certified copy of record to USSC, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF—
Filed October 16, 1970

1. The Jurisdiction of the Court arises under Title 28, U.S.C. 1343, and Title 42, U.S.C. 1983, *et sequitur.*

2. Declaratory relief is also sought pursuant to the jurisdiction conferred upon the Court under Title 28 U.S.C. 2201 and 2202.

3. This is a class action brought by plaintiffs on their own behalf and on behalf of all others similarly situated, to declare unconstitutional as applied Georgia Code Annotated § 26-1503 (Acts 1968, pp. 1249 et seq.), to enjoin criminal prosecutions against plaintiff Sandra Lee Becker, and further to enjoin defendants from further enforcement of the aforesaid statute so as to interfere with activities of the plaintiffs that are protected by the First and Fourteenth Amendments to the Constitution of the United States.

4. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pur-

suant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class is no numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protest the interests of the class. In addition, the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Parties

5(A) Plaintiff Sandra Lee Becker, a minor, suing by Louis D. Becker, her father and next friend, is an 18 year old citizen of the United States and of the State of Georgia residing in the Northern District of Georgia;

(B) Plaintiff Richard Guy Steffel, a minor, suing by Raymond C. Steffel, his father and next friend, is an eighteen year old full-time student at Georgia State University, and is a citizen of the United States and of the State of Georgia residing in the Northern District of Georgia;

(C) Plaintiff Atlanta Mobilization Committee is an unincorporated association of approximately 50 active members engaged in educational and organizing efforts to influence and change United States policy in Southeast Asia.

(D) Plaintiffs are all, individually, in association with each other, and in association with various organizations, dedicated to securing equal civil and legal rights for all persons who peacefully and non-violently oppose United States policy in Vietnam and Southeast Asia in accordance with the guarantees of the Constitution and the laws of the United States and the State of Georgia.

6(A) Defendant John R. Thompson is sued individually and in his official capacity as Solicitor of the Civil and Criminal Court of DeKalb County. He is charged

with the enforcement and administration of the challenged statute of DeKalb County.

(B) Defendant F. D. Hand is sued individually and in his official capacity as the Chief of Police of DeKalb County. Chief Hand is charged with the initial enforcement of the challenged statute in the unincorporated area of DeKalb County, Georgia.

(C) Defendant D. Scott Hudgens, Jr. d/b/a North DeKalb Shopping Center is sued individually and in his capacity as owner of the shopping center.

(D) Defendant G. T. Reynolds is sued individually and in his capacity as manager and agent of North DeKalb Shopping Center. Defendant Reynolds swore out the warrant for the arrest of Plaintiff Becker under the challenged statute.

Facts

7. The North DeKalb Shopping Center is a large, modern retail shopping center located in a partially residential, partially small business area in the unincorporated portion of DeKalb County, Georgia, approximately 4 miles from the city of Decatur, Georgia. The center is bounded on the east by the Lawrenceville Highway, U.S. 29, a large, heavily traveled multi-lane highway, and on the north by North Druid Hills Road. There are two entrances to the center from the Lawrenceville Highway. There are three streets that lead from North Druid Hills Road into the center's paved parking area. The center covers approximately three acres, including about forty-five acres of open, paved parking facilities for more than 2,000 automobiles. The center has a perimeter of approximately one mile.

8. The center has more than 50 commercial tenants, including small shops, major department stores, and a chain grocery store. Most of the said stores are located within a covered mall area with entrances to the stores leading from the covered mall area. Other stores are located outside the enclosed area and have separate en-

trances from the approximately 12 foot wide sidewalk that surrounds the mall. The center is open to the general public during business hours through approximately 12 entrances either through the tenant stores or through the center's unlocked doors.

9. On October 8, 1970, the plaintiffs, and others, individually and as representatives of the Atlanta Mobilization Committee, stood on an exterior sidewalk of the North DeKalb Shopping Center and distributed handbills inviting people to "March Against the War." (A copy of said handbill is attached hereto and marked "Exhibit A.") From on or about 8:00 p.m. until on or about 8:30 p.m. on the aforesaid date the distribution was quiet, peaceful, orderly, and did not interfere with the selling activities of the shopping center, and there was no littering. The shopping center's maintenance man and Security Guard told plaintiffs that they would have to cease their distribution and leave. When the plaintiffs explained that they were exercising their Constitutional rights, the Security Guard called the police. Three DeKalb County Police cars arrived, and one of the DeKalb County Policemen told plaintiffs that they had been told to stop distribution and that if they did not leave they would be arrested if a warrant were sworn out against them by the Shopping Center. The plaintiffs left to avoid arrest.

10. On October 10, 1970, the plaintiffs, individually and as representatives of the Atlanta Mobilization Committee, again stood on an outside walkway of the shopping center and distributed the same handbills and another handbill asking persons to boycott lettuce at the Colonial Store located at the Shopping Center. (A copy of said bandbill is attached hereto and marked "Exhibit B.") From on or about 10:30 a.m. until on or about 2:30 p.m. on the aforesaid date, the distribution was quiet, peaceful, orderly, did not interfere with the selling activities of the shopping center, and there was no littering. The Security Guard and the Manager of the

shopping center told plaintiffs that they would be arrested unless they ceased their distribution of the handbills and left the premises. Defendant Reynolds, the manager of the shopping center, called the DeKalb County Police Department. Two police cars arrived, and a DeKalb County Policeman told plaintiffs that they had been asked to stop their activities and to leave and that if they did not they would be arrested. Plaintiff Steffel left to avoid arrest. Plaintiff Becker declined to leave and was arrested on a charge of criminal trespass, Ga. Code Ann. § 26-1503. At all times during this handbilling the plaintiffs were exercising rights under the (1st Amendment to the) Constitution of the United States.

11. Plaintiff Becker was arrested and charged with "Criminal Trespass", a violation of Ga. Code Ann. § 26-1503, a statute of the State of Georgia. (A copy of said statute is attached hereto and marked "Exhibit C.") At the time of said arrest Plaintiff Becker in an orderly and peaceful manner was engaged in the distribution of leaflets. Plaintiff Becker was incancerated in the DeKalb County Jail until she was released on $200.00 bond. Her appearance for preliminary hearing is scheduled for Thursday, October 22, 1970, in the Civil and Criminal Court of DeKalb County, and her arraignment is scheduled for November 2, 1970.

12. Since the arrest of Plaintiff Becker, Plaintiff Steffel, other members and representatives of the Atlanta Mobilization Committee, and other members of Plaintiff's class have desired to return to the shopping center to distribute handbills but have been stopped from doing so because of fear of being arrested and charged with a violation of criminal trespass under Ga. Code Ann. § 26-1503.

13. Upon information and belief, other plaintiffs and members of their class will be arrested by defendants or their agents and charged with violation of said statute if the aforementioned handbilling activity continues.

14. Upon information and belief, the sole purpose of the defendants in enforcing the said statute was to intimidate, punish and harass plaintiffs and others of their class for exercising their rights to freedom of speech, petition, press and lawful protect.

15. At all times hereinabove mentioned, the defendants acted under color of the statutes, ordinances, regulations, customs, or usage of the State of Georgia.

Causes of Action

16. The statute which the defendants seek to enforce against Plaintiffs is unconstitutional as applied in that it abridges the plaintiffs' right of expression, press and lawful protest, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. Specifically, plaintiffs have been denied their right to handbill and protest peaceably against the War in Vietnam and the United States' foreign policy in Southeast Asia.

17. Ga. Code Ann. § 26-1503, as applied herein, violates plaintiffs' rights to freedom of speech, press, and protest as guaranteed them by the First and Fourteenth Amendments to the United States Constitution.

18. Ga. Code Ann. § 26-1503 as applied abridges free expression in that it chills and deters plaintiffs' rights of free speech as guaranteed by the First and Fourteenth Amendments by inhibiting the future exercise of rights guaranteed under the First and Fourteenth Amendments of the United States Constitution in that the threat of criminal arrest and prosecution will deter future peaceable handbilling in DeKalb County, Georgia.

Equity and Irreparable Injury

19. There is between the parties an actual controversy as hereinbefore set forth. The plaintiffs and those similarly situated are suffering irreparable injury and are threatened with irreparable injury in the future by rea-

son of the acts herein complained of in that a substantial loss or impairment of freedom of expression would occur if plaintiffs must await the State Court's disposition and ultimate review in the Federal Court of any adverse determination. Furthermore, the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution unaffected by prospects of its success or failure.

20. Plaintiffs have no plain, adequate, or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action. Any other remedy to which the plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, involve a multiplicity of suits, and cause further irreparable injury, damage and inconvenience to the plaintiffs and to those similarly situated.

Prayer

21. Wherefore, plaintiffs respectfully pray:

A. That this court issue a temporary restraining order restraining the defendants, their agents, employees, successors, and persons acting in concert or cooperation with them:

(1) from continuing the prosecution for "Criminal trespass" under Ga. Code Ann. § 26-1503 in any manner against plaintiff Sandra Lee Becker.

(2) from instituting, or threatening to institute criminal proceedings against plaintiffs or members of their class for violations of Ga. Code Ann. § 26-1503 of the State of Georgia.

(3) from harassing, intimidating or taking any other action against the plaintiffs or members of their class in connection with their peaceful handbilling activities through the area of the shopping center's exterior sidewalk and enclosed mall.

B. That after opportunity for hearing, this court issue a preliminary and permanent injunction against application of Ga. Code Ann. § 26-1503 to plaintiffs and their class, restraining and enjoining defendants, their agents, employees, successors, and persons acting in concert with them from further arresting, instituting proceedings against, prosecuting or in any way harassing plaintiffs or the members of their class in the exercise of their constitutionally protected rights of lawful and peaceful protest and specifically of peaceful handbilling in the area known as The North DeKalb Shopping Center or the shopping center mall;

C. That this court declare Ga. Code Ann. § 26-1503 unconstitutional as applied to the plaintiffs' first amendment activities as described herein;

D. That the court grant plaintiffs their costs and such other and further relief as may be equitable and proper.

Respectfully submitted,

/s/ William R. Gignilliat, III

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Attorney for Plaintiffs

Please Serve:
William R. Gignilliat, III

[Verification (omitted in printing)]

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

EXHIBIT C

26-1503. Criminal trespass.—(a) A person commits criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is $100 or less, or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

(b) A person commits criminal trespass when he knowingly and without authority:

(1) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, for an unlawful purpose; or

(2) Enters upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person, or within the vehicle, railroad car, aircraft, or watercraft of another person, after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor.

(Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS

—vs—

JOHN R. THOMPSON, ET AL., DEFENDANTS

STIPULATION—Filed October 28, 1970

It is hereby stipulated by and between the above-entitled parties for use in the above-captioned legal proceedings by their respective attorneys that:

1. Plaintiff Sandra Lee Becker, a minor, suing by Louis D. Becker, her father and next friend, is an 18 year old citizen of the United States and of the State of Georgia residing in the Northern District of Georgia.

2. Plaintiff Richard Guy Steffel, a minor, suing by Raymond C. Steffel, his father and next friend, is an 18 year old full-time student at Georgia State University, and is a citizen of the United States and of the State of Georgia residing in the Northern District of Georgia.

3. Plaintiff Atlanta Mobilization Committee is an unincorporated association of approximately 50 active members engaged among other things in educational and organizing efforts to influence and change United States policy in Southeast Asia and its principal place of business is in Atlanta, Georgia, and in the Northern District of Georgia.

4. Defendant John R. Thompson is the Solicitor of the State Court of DeKalb County and is charged with the enforcement and administration of the challenged statute in DeKalb County, Georgia.

5. Defendant F. D. Hand is the Chief of Police of DeKalb County, Georgia, and is charged with the initial enforcement of the challenged statute in the unincorporated area of DeKalb County, Georgia.

6. Defendant D. Scott Hudgens, Jr., d/b/a North DeKalb Shopping Center, is the owner of said shopping center.

7. Defendant G. T. Reynolds is the manager of North DeKalb Shopping Center; is the agent of D. Scott Hudgens, Jr., and is the individual who swore out the warrant for the arrest of plaintiff Sandra Lee Becker.

8. The North DeKalb Shopping Center is a large, modern retail shopping center located in a partially residential, partially small business area in the unincorporated portion of DeKalb County, Georgia, approximately 4 miles from the city of Decatur, Georgia. The center is bounded on the east by the Lawrenceville Highway, U.S. 29, a large, heavily traveled multi-lane highway and on the north by North Druid Hills Road. There are two entrances to the center from the Lawrenceville Highway. There are three streets that lead from North Druid Hills Road into the center's paved parking area. The shopping center and parking facilities cover approximately 50 acres of which about forty-five acres is open, paved parking facilities for approximately 3,000 automobiles. The center has a perimeter of approximately one mile.

9. The center has more than 50 commercial tenants, including small shops, major department stores, and a chain grocery store. Most of the said stores are located within a covered mall area with entrances to the stores leading from the covered mall area. Other stores are located outside the enclosed area and have separate entrances from the approximately 12 foot sidewalk that surrounds the mall. The center is open to the general public during business hours through approximately 12 entrances either through the tenant stores or through the center's unlocked doors.

10. On October 8, 1970, the plaintiffs, and others, individually and as representatives of the Atlanta Mobilization Committee, stood on an exterior sidewalk of the North DeKalb Shopping Center and distributed handbills inviting people to "March Against the War." From on or about 8:00 p.m. until on or about 8:30 p.m. on the aforesaid date the distribution was quiet, peaceful, orderly, and did not interfere with the selling activities

of the shopping center. There was no unreasonable littering in relation to the number of handbills distributed. The shopping center's maintenance man and security guard told plaintiffs that they would have to cease their distribution and leave. When the plaintiffs explained that they were exercising their Constitutional rights, the security guard called the police. Three DeKalb County Police cars arrived, and one of the DeKalb County Policemen told plaintiffs that they had been told to stop distribution and that if they did not leave they would be arrested if a warrant were sworn out against them by the Shopping Center. The plaintiffs left to avoid arrest.

11. On October 10, 1970, the plaintiffs, individually and as representatives of the Atlanta Mobilization Committee, again stood on an outside walkway of the shopping center and distributed handbills. From on or about 10:30 a.m. until on or about 2:30 p.m. on the aforesaid date, the distribution was quiet, peaceful, orderly; did not interfere with the selling activities of the shopping center. There was no unreasonable littering in relation to the number of handbills distributed. The security guard and the manager of the shopping center told plaintiffs that they would be arrested unless they ceased their distribution of the handbills and left the premises. Defendant Reynolds, the manager of the shopping center, called the DeKalb County Police Department. Two police cars arrived, and a DeKalb County Policeman told plaintiffs that they had been asked to stop their activities and to leave, and that if they did not they would be arrested. Plaintiff Steffel left to avoid arrest. Plaintiff Becker declined to leave and was arrested on a charge of criminal trespass. Ga. Code Ann. § 26-1503.

12. Plaintiff Becker was arrested and charged with "Criminal Trespass," a violation of Ga. Code Ann. § 26-1503, a statute of the State of Georgia. (A copy of said statute is attached hereto and marked "Exhibit A".) At the time of said arrest plaintiff Becker in an orderly and peaceable manner was engaged in the distribution of handbills. Plaintiff Becker was incarcerated in the DeKalb County Jail until she was released on $200.00 bond. Plaintiff Becker appeared for a preliminary hear-

ing on Thursday, October 22, 1970, and was bound over to the State Court of DeKalb County, Georgia. Her arraignment is scheduled for the first Monday in December, 1970.

13. Plaintiffs and other members of their class will be asked to cease their handbilling activities, warrants will be sworn out against them, and they may be arrested by defendants or their agents and charged with violations of said statute if the aforementioned handbilling activity continues.

14. At all times hereinbeforementioned, the defendants acted under color of the statutes, ordinances, regulations, customs, or usage of the State of Georgia.

Dated this 28th day of October, 1970.

/s/ William R. Gignilliat, III

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center, DEFENDANTS

ANSWER OF DEFENDANTS THOMPSON AND HAND—
Filed November 2, 1970

FIRST DEFENSE

Plaintiffs have failed to state a claim against Defendants Thompson and Hand upon which relief may be granted.

SECOND DEFENSE

Plaintiffs, who here seek equitable relief, have not themselves done equity. Plaintiffs Becker and Steffel accompanied by Attorneys Gignilliat and Myer went to North DeKalb Shopping Center for express purposes of testing the validity of Ga. Code Anno. 26-1503. Arrest was welcomed so that a suit might ensue. Thus Plaintiffs have no standing here at equity to contest the validity of 26-1503.

THIRD DEFENSE

Plaintiffs for purposes of equitable relief have waived their claims as to the constitutional merits of Ga. Code Anno. 26-1503 on the facts alleged in their Complaint since Plaintiffs wilfully sought an arrest of one of their members under the statute involved here.

FOURTH DEFENSE

Defendants Thompson and Hand now respond to the separate Paragraphs of Plaintiffs' Complaint as follows:

1.

These Defendants admit personal jurisdiction over Defendants Thompson and Hand but deny the subject-matter jurisdiction as alleged in Paragraph 1 of Plaintiffs' Complaint as such statutes are not applicable herein.

2.

These Defendants admit personal jurisdiction over Defendants Thompson and Hand but deny the subject-matter jurisdiction as alleged in Paragraph 2 of Plaintiffs' Complaint as such statutes are not applicable herein.

3.

These Defendants admit the allegations in Paragraph 3 of Plaintiffs' Complaint.

4.

These Defendants admit that Plaintiffs in Paragraph 4 of Plaintiffs' Complaint are suing under Rules 23 (a) and 23 (b) (2) of the Federal Rules of Civil Procedure. Defendants Thompson and Hand deny that they have acted on grounds generally applicable to the alleged class inasmuch as Plaintiffs here deliberately sought an arrest and it cannot be shown that the alleged class will also deliberately seek arrest or that Defendants Thompson

and Hand will be required to act on warrants sworn by aggrieved citizens; therefore, these Defendants deny that any equitable relief is appropriate as to the alleged class.

5.

These Defendants admit the allegations in Paragraph 5(A) and 5(B) of Plaintiffs' Complaint. These Defendants admit that Plaintiff Atlanta Mobilization Committee is an unincorporated association engaged in educational and organizing efforts to influence and change United States policy in Southeast Asia. These Defendants further show that said Committee engages in other activities, particularly by aligning itself in the national grape and lettuce strikes on the side of the striking grape and lettuce pickers against the grape and lettuce producers, and by selectively boycotting grocery stores which are part of the chain of stores operating in agreement with Colonial Stores, Inc. As to the size of said Committee's membership, these Defendants can neither admit nor deny Plaintiffs' allegation on grounds of lack of sufficient knowledge or belief.

For lack of sufficient information or belief these Defendants can neither admit nor deny the allegations in Paragraph 5(D) of Plaintiffs' Complaint.

6.

Defendants Thompson and Hand admit that Thompson is the Solicitor of the State Court of DeKalb County and that Thompson prosecutes violations of the portion of the statute here in question after a warrant has been sworn and the accused arrested.

Defendants Thompson and Hand admit that Hand is charged with enforcement of the portion of the statute here in question after a warrant has been sworn and given to him or one of his police officers.

Defendants Thompson and Hand, for lack of sufficient information and belief, can neither admit nor deny the allegations in Paragraph 6(C) and 6(D) of Plaintiffs' Complaint.

7.

These Defendants admit the allegations in Paragraph 7 of Plaintiffs' Complaint.

8.

These Defendants admit the allegations in Paragraph 8 of Plaintiffs' Complaint.

9.

These Defendants admit the allegations in Paragraph 9 of Plaintiffs' Complaint.

10.

These Defendants admit the allegations in Paragraph 10 of Plaintiffs' Complaint except that these Defendants deny that Plaintiffs were protected under the guarantees of the First or Fourteenth, or both, Amendments or any other part of the Constitution of the United States, in the acts done by Plaintiffs on October 10, 1970.

11.

These Defendants admit that a warrant was sworn, that Plaintiff Becker was arrested, that she was incarcerated until she was released on two hundred ($200.00) dollar bond which was posted by "Emory Legal Aid" (her own words), that she appeared at a preliminary hearing on Thursday, October 22, 1970, and that she was bound over for arraignment on the first Monday in December, 1970.

12.

For lack of sufficient information and belief these Defendants can neither admit nor deny the allegations in Paragraph 12 of Plaintiffs' Complaint.

13.

For lack of sufficient information and belief these Defendants can neither admit nor deny the allegations in Paragraph 13 of Plaintiffs' Complaint.

14.

These Defendants deny the allegations in Paragraph 14 of Plaintiffs' Complaint as to the purpose of Defend-

ants Thompson and Hand. As to Plaintiffs' information and belief, these Defendants can neither admit nor deny for lack of sufficient information and belief of their own.

15.

These Defendants admit the allegations in Paragraph 15 of Plaintiffs' Complaint.

16.

These Defendants deny the allegations in Paragraph 16 of Plaintiffs' Complaint.

17.

These Defendants deny the allegations in Paragraph 17 of Plaintiffs' Complaint.

18.

These Defendants deny the allegations in Paragraph 18 of Plaintiffs' Complaint.

19.

These Defendants deny the allegations in Paragraph 19 of Plaintiffs' Complaint.

These Defendants further show that Plaintiffs acted in a way so as to invite and welcome an arrest and were acting in bad faith, and have been stubborn and litigious.

20.

These Defendants deny the allegations in Paragraph 20 of Plaintiffs' Complaint.

21.

These Defendants need not deny or admit the statements in Paragraph 21 of Plaintiffs' Complaint.

WHEREFORE, Defendants Thompson and Hand respectfully pray:

I

That this Court refrain from issuing a temporary restraining order as to these Defendants, restraining them in any way in the performance of the obligations, responsibilities and duties of their respective offices as to violations of Ga. Code Anno. Sec. 26-1503;

II

That this Court dismiss Plaintiffs' Complaint and prayer for a temporary restraining order;

III

That this Court refrain from issuing a preliminary and a permanent injunction against the application of Ga. Code Anno. 26-1503 to Plaintiffs and their alleged class, and refrain from enjoining Defendants Thompson and Hand in any way in the performance of the obligations, responsibilities and duties of their offices as to violations of Sec. 26-1503;

IV

That this Court dismiss Plaintiffs' Complaint and prayer for temporary and permanent injunctions;

V

That this Court refrain from declaring Ga. Code Anno. 26-1503 unconstitutional in any way and particularly as applied to the Plaintiffs' activities described hereinbefore;

VI

That this Court dismiss Plaintiffs' Complaint and prayer for declaratory judgment on the constitutionality of Ga. Code Anno. 26-1503 as applied to the Plaintiffs' activities described hereinbefore or as applied in any other way;

VII

That this Court refrain from granting Plaintiffs their costs or any other equitable relief;

VIII

That this Court find that Plaintiffs, or any one of them, have acted in bad faith and have been stubborn and litigious and that Defendants Thompson and Hand are each entitled to reasonable attorneys fees for defending this action, as well as these Defendants being entitled to costs;

IX

That this Court grant Defendants Thompson and Hand their costs and such other and further relief as may be equitable and proper.

Respectfully submitted,

/s/ Robert E. Mozley

/s/ George P. Dillard

/s/ Herbert O. Edwards
Attorneys for Defendants
Thompson and Hand

558 Church Street
Decatur, Georgia, 30030
373-5757

[Verification (Omitted in Printing)]

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGENS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center, DEFENDANTS

ANSWER OF DEFENDANTS HUDGENS & REYNOLDS—
Filed November 9, 1970

FIRST DEFENSE

Plaintiffs have failed to state a claim against Defendants Hudgens and Reynolds upon which relief may be granted.

SECOND DEFENSE

In response to Plaintiffs Complaint, Defendants Hudgens and Reynolds respond as follows:

1.

Defendants deny the allegations of Paragraph One except as to personal jurisdiction over Defendants.

2.

Defendants deny that this court can grant declaratory relief pursuant to jurisdiction conferred upon the court under Title 28 USC 2201 and 2202.

3.

Defendants admit the allegations contained in Paragraph Three.

4.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraph Four.

5.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraphs 5(A), 5(B), 5(C) and 5(D).

6.

Defendants admit the allegations contained in Paragraph 6(A), 6(B), 6(C) and 6(D).

7.

Defendants admit the allegations contained in Paragraph Seven.

8.

Defendants admit the allegations contained in Paragraph Eight.

9.

Defendants deny the allegation that the Plaintiffs activities on October 8, 1970 did not interfere with the selling activities of the shopping center or that there was no littering. Defendants admit all other allegations contained in Paragraph Nine.

10.

Defendants deny: (a) that Plaintiffs on October 10, 1970 between the hours of 10:30 A.M. and 2:30 P.M. distributed handbills "asking persons to boycott lettuce at the Colonial Store;" (b) that the distribution did not

interfere with the selling activities of the shopping center; (c) that there was no littering; and (d) that the Plaintiffs were exercising rights under the First Amendment to the Constitution of the United States. Defendants admit all other allegations contained in Paragraph Ten.

11.

Defendants admit that Plaintiff Becker was arrested and incarcerated until posting a two hundred ($200) dollar bond and that a preliminary hearing was conducted on October 22, 1970. Defendants deny all other allegations in Paragraph Eleven.

12.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraph Twelve.

13.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraph Thirteen.

14.

Defendants deny all allegations contained in Paragraph Fourteen, except that Defendants neither admit nor deny the information and belief of the Plaintiffs.

15.

Defendants admit the allegations contained in Paragraph Fifteen.

16.

Defendants deny the allegations contained in Paragraph Sixteen.

17.

Defendants deny the allegations contained in Paragraph Seventeen.

18.

Defendants deny the allegations contained in Paragraph Eighteen.

19.

Defendants deny the allegations contained in Paragraph Nineteen.

20.

Defendants deny the allegations contained in Paragraph Twenty.

WHEREFORE, Defendants Hudgens and Reynolds respectfully pray:

I

That this Court refrain from issuing the temporary restraining order requested by Plaintiffs.

II

That this Court dismiss the Plaintiff's complaint and prayer for a temporary restraining order.

III

That this Court refrain from issuing a preliminary and permanent injunction against application of Ga. Code Annotated § 26-1503 to Plaintiffs and refrain from restraining and enjoining Defendants as requested by Plaintiffs.

IV

That this Court dismiss Plaintiff's complaint and prayer for a temporary and permanent injunction.

V

That this Court refrain from declaring Ga. Code Annotated § 26-1503 unconstitutional as applied to Plaintiffs.

VI

That this Court dismiss Plaintiff's complaint and prayer for a declaratory judgment on the constitutionality of Ga. Code Annotated § 26-1503 as applied to Plaintiffs.

VII

That this Court refrain from granting Plaintiffs their cost or any other relief.

VIII

That this Court grant Defendants Hudgens and Reynolds their costs, including attorney's fees, and such other and further relief as may be equitable and proper.

Respectfully submitted,

/s/ Dock H. Davis

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Phone—762-8663

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ET AL.

versus

JOHN R. THOMPSON, ET AL.

ORDER—January 8, 1971

Presently pending before the court are plaintiffs' prayers for injunctive and declaratory relief.

The court declines to enjoin the prosecution of Sandra Lee Becker pursuant to the holdings of *Atlantic Coast Line R. Co.* v. *Engineers*, 398 U.S. 281 (1970) and; *Mistrot* v. *Wade*, —— F.2d ——, Civil No. 28900 (5th Cir. Nov. 6, 1970).

Further consideration of the cause now pending, including the prayers for declaratory relief by both plaintiffs, is hereby stayed pending the decision of the United States Supreme Court in the following cases either awaiting decision or argument: *Samuels* v. *Mackell*, 39 U.S. L.W. 3014 (U.S. Nov. 16, 1970) (no. 7); *Dyson* v. *Stein*, 39 U.S. L.W. 3017 (U.S. Nov. 16, 1970 (No. 41); *Pacific Indemnity Co.* v. *Acel Delivery Service, Inc.*, 39 U.S. L.W. 3281 (U.S. Dec. 29, 1970) (No. 1119) and; *O'Hair* v. *Paine*, 39 U.S. L.W. 3281 (U.S. Dec. 29, 1970) (No. 1120). The court feels that the decision of the Supreme Court in any or all of these cases will be dispositive of many of the issues herein involved.

Consequently, the case is hereby stayed until further order of the court.

So ordered this the 8th day of January, 1971.

/s/ Albert J. Henderson, Jr.
Judge,
United States District
Court for the Northern
District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ET AL.

versus

JOHN R. THOMPSON, ET AL.

ORDER—January 18, 1971

Plaintiff moves the court to vacate its prior order staying all further proceedings until the disposition of several pending cases by the United States Supreme Court.

The propriety of granting or denying injunctive relief, and the issue of whether consideration of declaratory relief is thereafter permissible are two questions either directly or collaterally involved in the cited cases awaiting decision. In order to properly consider plaintiff's case pursuant to the most recent statements of the law, the court determined that the merits of present action were best resolved subsequent to the decisions referred to above.

Accordingly, the motion of plaintiff is hereby denied.

So ordered this the 18th day of January, 1971.

/s/ Albert J. Henderson, Jr.
Judge,
United States District
Court for the Northern
District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ET AL.

versus

JOHN R. THOMPSON, ET AL.

ORDER—March 19, 1971

By order dated January 8, 1971, this court stayed further proceedings in the above styled case until the United States Supreme Court had opportunity to consider several cases thought to pertain to issues herein relevant. Two of the awaited decisions, *Samuels* v. *Mackell*, 39 U.S. L.W. 4211 (U.S. Feb. 23, 1971) and *Dyson* v. *Stein*, 39 U.S.L.W. 4231 (U.S. Feb. 23, 1971), were recently announced in conjunction with several others, the totality of which makes further staying of this action clearly inappropriate. Accordingly, the issues in this case will be considered in light of the most recent pronouncements of the Supreme Court.

The plaintiffs, in this class action suit, seek to have the court declare unconstitutional, as applied, Ga. Code Ann. § 26-1503 (Acts 1968, p. 1249 *et seq.*); to enjoin the criminal prosecution presently pending against the plaintiffs, Sandra Lee Becker; further, to enjoin future enforcement of said statute as to these plaintiffs; and for a declaration of the plaintiffs' rights in the distribution of handbills in a shopping center. Jurisdiction is based on 28 U.S.C. §§ 1343, 2201 and 2202, and 42 U.S.C. § 1983, *et seq.*

This court denied the plaintiffs' motion for a temporary restraining order, pursuant to a hearing on October 20, 1970. Plaintiffs' motion for preliminary and permanent injunction and declaratory relief came on for hearing on October 28, 1970, at which time all parties to the dispute stipulated their willingness to consider it the final hearing

in the present action. This order is based on the evidence then presented and the stipulation of the parties submitted to the court.

The basic issue presented is the plaintiffs' desire to distribute handbills at the North DeKalb Shopping Center, located in a partially residential, partially commercial area in the unincorporated portion of DeKalb County, Georgia, approximately four miles from the City of Decatur, Georgia.

On Thursday, October 8, 1970, the plaintiffs and others, individually and as representatives of the Atlanta Mobilization Committee, stood on the exterior sidewalk of the North DeKalb Shopping Center and distributed handbills inviting people to "March Against the War" and to abstain from purchasing lettuce at the Colonial Supermarket ("because this inflationary war continues to starve Mexican lettuce pickers"). Pursuant to the shopping center's regulations, adopted shortly after the center's opening in 1965, the center's maintenance man and security guard told the plaintiffs that they would have to cease their distribution and leave. The plaintiffs refused and, in accordance with the guard's standing instructions, the on-site manager was notified. He, in turn, called the DeKalb County Police. The police advised the plaintiffs that they would be arrested should they persist in their actions. In response to this admonition by the police officers, the plaintiffs departed.

The plaintiffs, however, returned on Saturday, October 10, 1970, accompanied by Messers. William Ginilliat and John R. Meyer, staff attorneys for the Emory Legal Services Center. Mr. Meyer brought a camera for the avowed "probability of later use in some litigation." See transcript pp. 30-31. The defendant, Reynolds, explained to Mr. Ginilliat, pursuant to a request for permission, that the center's regulations prohibited the distribution of leaflets on its property. Further, Mr. Ginilliat was informed that if the plaintiffs persisted in their efforts to pass out the leaflets he would have no alternative but to summon the DeKalb County Police.

Despite this warning, and while Mr. Meyer took pictures, the plaintiffs began distributing anti-war leaflets on the sidewalk in front of the Colonial Supermarket. When the manager and security guard discovered that

leaflets were being distributed, the plaintiffs were again advised that their actions were in violation of the regulations of the shopping center, and that they would have to cease their activity or police assistance would be requested. Upon the plaintiffs' refusal, the defendant, Reynolds, called the DeKalb County Police. Although the plaintiffs were told that they would be arrested pursuant to the complaint of the shopping center, the plaintiff, Becker, refused to discontinue her handbilling, and was thereby arrested on a charge of criminal trespass. Ga. Code Ann. § 26-1503. The plaintiff, Steffel, ceased his activity in this regard, allegedly because he did not desire to be arrested under the criminal trespass statute.

The plaintiffs contend that they wish to continue their activities in the distribution of handbills at the shopping center, but will refrain from doing so solely because they fear warrants for their arrest will be sworn out against them, and that they may be arrested and prosecuted for violating the Georgia criminal trespass statute. Those defendants representing the shopping center indicate that they will continue to insist on the strict enforcement of their regulations, and, therefore, will repeatedly summon the police, swear out warrants for the plaintiffs' arrest, and pursue active prosecution under the trespass statute. The state defendants, however, assert that an incident by incident decision will be made based on whether the facts of a particular case show a violation of the law.

This court, in its order dated January 8, 1971, anticipated the subsequent decisions of the Supreme Court when it refused to enjoin the then pending prosecution of the plaintiff Becker. This court cited *Atlantic Coast Line R. Co.* v. *Engineers*, 398 U.S. 281 (1970), which upheld, with ample clarity, the long standing policy of the federal courts to refrain from interfering with the orderly administration of state justice. The correctness of this holding has now been shown by the decision of the Supreme Court in *Younger* v. *Harris*, 39 U.S.L.W. 4201 and 4208 (U.S. Feb. 23, 1971); *Boyle* v. *Landry*, 39 U.S.L.W. 4207 (U.S. Feb. 23, 1971); *Samuels* v. *Mackell*, *supra*; *Perez* v. *Ledesma*, 39 U.S.L.W. 4214 (U.S. Feb. 23, 1971); *Dyson* v. *Stein*, *supra*; and *Byrne* v. *Karalexis*, 39 U.S.L.W.

4236 (U.S. Feb. 23, 1971). In what will undoubtedly become, in years to come, one of the most frequently interpreted judicial phrases, the Court held that,

> . . . [A] federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a *threat of irreparable injury 'both great and immediate'*. (emphasis added).

Younger v. *Harris*, *supra*, at 4208. With reference to whether this court should nevertheless consider Becker's demand for declaratory relief, the following quotation is found dispositive,

> We therefore hold that in cases where the state criminal prosecution has begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by the federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Samuels v. *Mackell*, *supra*, at 4213. Lastly, in finding that the plaintiff, Becker, has not met the prerequisites of "irreparable injury", the court applies the following test to the facts herein,

> . . . [E]ven irreparable injury is insufficient unless it is 'both great and immediate'. *Fenner* v. *Boykin*, 271 U.S. 240 (1926). Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. See, *e.g.*, *Ex Parte Young*, *supra*, at 145-147.

Younger v. *Harris*, *supra*, at 4203.

Based upon these holdings, the court refuses to grant either injunctive or declaratory relief to the plaintiff Becker.

A slightly different question, however, is presented as to the plaintiff Steffel and the other members of the class he seeks to represent, inasmuch as no criminal prosecution is now pending against them. The Supreme Court, while specifically declining to express its view as to the propriety of giving injunctive or declaratory relief from *future* state criminal prosecutions, did state its considered opinion as to when federal intervention is justified.

In the process of distributing and limiting *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), the Court in *Younger* v. *Harris*, *supra*, recognized that there may exist at some time an extraordinary occasion where irreparable injury could be shown in the absence of bad faith and harassment. See, *Watson* v. *Buck*, 313 U.S. 387 (1941), but as to the majority of situations, stated that,

> . . . the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief.

Younger v. *Harris*, *supra*, at 4206. Further, in *Boyle* v. *Landry*, *supra*, the Court refused to consider the plaintiffs' allegations challenging the constitutionality of an uncharged state "intimidation" statute because there was no showing that plaintiffs were in any "jeopardy of suffering irreparable damages if the State is left free to prosecute under the intimidation statute in the normal manner." *Id.*, at 4208. Finally, the Court vacated a district court decision in *Dyson* v. *Stein*, *supra*, which involved, as here, a class action suit, and, the grant of injunctive and declaratory relief. The holding required the lower court to make findings of fact as to a claim of threatened irreparable injury, prior to granting the class any relief.

The impact of these opinions is clearly that the district court must not hypothesize as to what the consequences of a future arrest might be, and that in the ab-

sence of a showing of bad faith enforcement and/or harassment the federal judiciary should refrain from interference in the orderly function of the state criminal process. In the case at bar, no meaningful contention can be made that the state has or will in the future act in bad faith. Rather, it appears that the plaintiffs', by their conduct and the conduct of their attorneys, intended to seek a federal court test. Without the rudiments of an active controversy between the parties, the court finds that the equitable bases for considering this claim to be lacking.

Accordingly, the plaintiffs prayers for injunctive and declaratory relief are denied, and judgment is hereby entered in favor of the defendants.

So ordered this the 19th day of March, 1971.

/s/ Albert J. Henderson, Jr.
Judge,
United States District
Court for the Northern
District of Georgia

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

Civil Action File No. 14,260

SANDRA LEE BECKER, ET AL.

vs.

JOHN R. THOMPSON, ET AL.

JUDGMENT—March 24, 1971

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, denying plaintiffs' prayers for injunctive and declaratory relief,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action is hereby dismissed, and that the defendants, JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County, F. D. HAND, Chief of the DeKalb County Police, D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center, and G. T. REYNOLDS, Manager of North DeKalb Shopping center recover of the plaintiffs, SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend, RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend, and ATLANTA MOBILIZATION COMMITTEE and on behalf of all others similarly situated, their costs of action.

Dated at Atlanta, Georgia, this 24th day of March, 1971.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ETC., ET AL.

vs.

JOHN R. THOMPSON, ETC., ET AL.

NOTICE OF APPEAL—Filed April 23, 1971

Notice is hereby given that Richard Guy Steffel, one of the plaintiffs above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment denying plaintiff Steffel's prayers for injunctive and declaratory relief entered in this action on the 24th day of March, 1971.

/s/ William R. Gignilliat, III

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Attorneys for Plaintiffs

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1856

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS
RICHARD GUY STEFFEL, PLAINTIFF-APPELLANT

versus

JOHN R. THOMPSON, ETC., ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

OPINION—May 3, 1972

Before TUTTLE, GEWIN and DYER, Circuit Judges.

DYER, Circuit Judge: In this appeal we must meet the issue explicitly reserved in *Samuels* v. *Mackle*, 1971, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688, that is, the propriety of granting declaratory relief when no state criminal proceedings is pending at the time the federal suit is begun. Finding no bad faith enforcement or harassment by the state, the district court denied declaratory relief and entered judgment in favor of the defendants. We affirm.

The facts are undisputed. The action takes place at the North DeKalb Shopping Center. It is a large, modern, retail shopping area located in a partially residential, partially small business area of unincorporated North DeKalb County, Georgia. It contains a large parking lot and a totally covered air conditioned building complex housing more than sixty retail tenants surrounded by a wide exterior sidewalk.

Since its opening in 1965 the Center has enforced its regulations against handbilling because it desired

to maintain an attractive place for its customers to shop without interference or irritation. The Boy Scouts and local garden clubs are permitted to use the booths inside the Mall for bake sales and to give information concerning their activities.

On October 8, 1970, plaintiffs Steffel, Becker and others stood on the exterior sidewalk of the Center and distributed hand bills informing passersby of a meeting protesting the war in Indo-China. The plaintiffs were soon instructed by a Center private security guard that they could not distribute the hand bills and were ordered to leave. When they refused the DeKalb County Police were called. When the police arrived plaintiffs were informed that, if they did not stop distribution of hand bills, they would be arrested. The plaintiffs left and no arrests were made.

On October 10, 1970, an attorney for the plaintiffs asked the manager of the Center to permit them to distribute anti-war handbills. Permission was refused. Nevertheless, Steffel and Becker returned to the Center and again, in an orderly fashion, distributed handbills from the exterior sidewalk while other members of the group made photographs. Steffel and Becker were again advised by the security guard and the Center's manager that they could not distribute the handbills and that, if they persisted in doing so, they would be arrested. Ultimately the DeKalb County police arrived and told Becker and Steffel to discontinue their activity or they would be arrested. Steffel left to avoid arrest. Becker continued to distribute the handbills and was arrested on a charge of criminal trespass, pursuant to the provisions of Ga. Code § 26-1503.[1] Becker was released on bond. Subse-

[1] Ga. Code § 26-1503 provides:

Criminal trespass * * *

(b) A person commits criminal trespass when he knowingly and without authority:

(3) Remains upon the land or premises of another person, or * * * after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor. (Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)

quently a preliminary hearing was held and she was arraigned.[2]

In the court below Steffel testified that he had not returned to the Center to handbill since the time of Becker's arrest because he did not "want to be arrested that badly."

Becker and Steffel filed this civil class action for declaratory and injunctive relief against Hudgins, the owner of the Center, Reynolds, his agent, Solicitor Thompson and Police Chief Hand of DeKalb County attacking the constitutionality of the Georgia criminal trespass statute as applied to them and their class in the distribution of hand bills at the Center, relying on *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 1968, 391 U.S. 308, and *Marsh* v. *Alabama*, 1946, 326 U.S. 501.

The district court denied Becker's prayer for injunctive relief on the basis of *Younger* v. *Harris*, 1971, 401 U.S. 37, and for declaratory relief, on the basis of *Samuels* v. *Mackle, supra*, because of the pending state criminal prosecution against her. No appeal has been taken by Becker.

The district court also denied both the injunctive and declaratory relief sought by Steffel, against whom no state criminal prosecution was pending.

Steffels argument on brief points up the narrow issue presented on appeal as follows:

> The District Court was correct in applying this "bad faith/harassment" test to appellant Steffel's request for injunctive relief against future threatened state court criminal prosecutions. See for example, *Younger* v. *Harris*, 401 U.S. at 44-45 where the Court stated that "These principles made clear in the *Fenner* case [great and immediate irreparable loss required to justify enjoining a state prosecution] have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. (citing

[2] At oral argument the Court was informed that Becker's trial had been indefinitely continued, presumably awaiting the disposition of this appeal.

cases including *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943).

The District Court erred, however, in applying this same stringent test to Appellants' request for declaratory relief. * * * [A] different balance is to be struck concerning questions of federal-state comity where federal declaratory relief is sought and no state prosecution is pending against the plaintiff.

Stated another way, is the propriety of granting a declaratory judgment concerning threatened future criminal prosecution determined by the same test as the propriety of granting injunctive relief, i.e., bad faith harassment? *Younger* v. *Harris*, *supra*. May we transpose to this case, where no state prosecution was pending, what was said about declaratory relief in *Samuels* v. *Mackle*, *supra*, where a state prosecution was pending:

> [T]he same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and * * * where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Id. at 73.

In limine we note that it was emphasized in the "Supreme Court's February sextet"[3] that the resolution of the problems involved when a federal court is asked to give injunctive or declaratory relief from future state criminal prosecution was left to a later day. Thus the court clearly did not determine the propriety of federal declaratory relief against threatened criminal prosecution.

While the question was reserved, *Younger* made it clear beyond peradventure that irreparable injury must be measured by bad faith harassment[4] and such test

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[3] *LeFlore, et al* v. *Robinson*, et al., 5 Cir. 1971, 446 F.2d 715, (Judge Goldberg, specially concurring opinion).

[4] "There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence

must be applied to a request for injunctive relief against *threatened* state court criminal prosecution. In fact, as we pointed out, Steffel concedes that this principle was viable even before *Younger* and was reiterated in it by the Court's reliance on *Fenner* v. *Boykin*, 1926, 271 U.S. 240, and *Douglas* v. *City of Jeannette*, 1943, 319 U.S. 157. These cases underscore that "the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury." *Douglas* at 163, 164.

In *Samuels* v. *Mackle*, *supra*, it was made unequivocally clear that "ordinarily a declaratory judgment will result in precisely the same interference and disruption of state proceedings as the long standing policy limiting injunctions was designed to avoid." *Id.* at 72. This is so, of course, because the declaratory judgment may serve as the basis for a subsequent injunction and "even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would." *Id.* Again the Court reserved the question concerning threatened as opposed to pending state prosecutions.

If the practical effects of injunctive and declaratory judgment remedies are identical because they result in the disruption of a state's enforcement of its criminal statutes when a criminal prosecution is pending, and therefore bad faith harassment must be shown before either remedy may issue, and if, as we have seen, the same test of bad faith harassment is prerequisite to injunctive relief in a threatened criminal prosecution, it follows that a like showing must be made for declaratory relief in a threatened prosecution. Although "The holdings of *Younger* and *Samuels* are narrow [and] limited to the propriety of declaratory or injunctive relief while state criminal proceedings are pending * * * Justice Black's discussion of *Dombrowski* has much broader im-

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of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris*, *supra* at 53-4. We do not find any extraordinary circumstances present here.

plications, suggesting that even when state proceedings have not yet begun, injunctive relief—as authorized by *Dombrowski*—or declaratory relief—as authorized by *Zwickler* v. *Koota*, a 1967 case relying heavily on *Dombrowski*—may be conditioned on the same bad faith requirements. * * * In short, the reasoning in *Younger* would appear to ignore any distinction between pending and threatened proceedings, and make denial of federal relief obligatory in both situations unless bad faith enforcement can be shown." (footnotes omitted) 85 Harvard L. Rev. 304, November, 1971.

In *Wulp* v. *Corcoran*, 1 Cir. 1972, —— F.2d ——, [No. 71-1214, January 11, 1972] the Court, in a threatened state criminal prosecution case, held that declaratory relief was available without a showing of bad faith harassment. It reasoned that there were significant differences in the appropriateness of injunctive and declaratory relief between pending and preprosecution contests. In other words, *Wulp* cannot be read in any way but that it construed the *Younger* sextet to mean that bad faith harassment had to be shown for injunctive or declaratory relief in pending prosecutions, but is not required to be shown for either remedy when the prosecution is threatened but not pending.

In our view this not only effectively overrules *Ex Parte Young*, 1908, 209 U.S. 23; *Fenner* v. *Boykin*, 1926, 271 U.S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 1935, 295 U.S. 89; *Beal* v. *Missouri Pa. R. Co.*, 1941, 312 U.S. 45; *Watson* v. *Buck*, 1941, 313 U.S. 387; *Williams* v. *Miller*, 1942, 317 U.S. 599; and *Douglas* v. *City of Jeannette*, 1943, 319 U.S. 157 but also revives the misconception concerning the broad sweep of *Dombrowski* that *Younger* took pains to point out and disapprove.

It is, of course, self-evident that where state prosecutions were pending *Younger* and *Samuels* established a limitation on the use of the Declaratory Judgment Act, 28 U.S.C.A. § 2201, to those cases where bad faith harassment was shown. The same limitation on the use of the Act necessarily applies in preprosecution cases. It is here that we part company with *Wulp*, *supra*, and Mr. Justice Brennan's views in *Perez* v. *Ledesma*, 401

U.S. 93, et seq. (the majority of the Court not having considered this issue).

Younger laid great stress upon *Buck, supra*, that:

> Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid." *Beal* v. *Missouri Pacific Railroad Corp.*, 312 U.S. 45, 49.

There is, of course, no suggestion that the principles enunciated in *Buck* are not still viable.

If "the propriety of declaratory and injunctive relief should be judged by essentially the same standards", then in pre-prosecution cases there must be a showing of bad faith harassment for the granting of declaratory as well as injunctive relief. *Cooley* v. *Endictor*, 5 Cir. 1972, —— F.2d ——, [No. 71-3207, April 3, 1972].

We conclude that under the circumstances of this case, where no state prosecution was pending against Steffel since there was no showing of bad faith harassment, he was not entitled to a declaratory judgment.

The judgment of the district court is

AFFIRMED.

TUTTLE, Circuit Judge, CONCURRING IN RESULT.

I concur in the result reached by the majority. However, on the facts of this case, I feel that nearly all of what the majority has said is unnecessary to a decision in this case, and is thus obiter dictum. Unlike *Younger* v. *Harris*, 401 U.S. 82 (1971), and its companion cases, the case we have before us does not involve a *pending*

state court prosecution. Nor does it involve a statute which is facially defective in any way; nor does the complaint contain any allegation of "bad faith harassment." Under these facts it is simply unnecessary to speculate on what effect the "February Sextet" had on *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), and its progeny, or in effect, to guess how the Supreme Court would rule on an issue it explicitly stated that it was *not* deciding.[1]

In short, since I feel that under the facts of this case, Dombrowski itself would not justify federal intervention, I decline the invitation to broaden unnecessarily my decision by speculating on what the Supreme Court may or may not ultimately do.

In *Dombrowski* v. *Pfister*, supra, the court held that the allegation of bad faith prosecution stated a claim under 42 U.S.C. § 1983 and that if this allegation was proven to be true, an injunction must be granted. In addition, the court stated that the Louisiana statutes involved in that case were so vague and overbroad as to be highly susceptible to unconstitutional application. Thus, their very existence tended to have a "chilling effect" upon the exercise of first amendment rights involved in that case. The court therefore issued another injunction restraining state officials from enforcing or threatening to enforce the statute involved against anyone until it received a narrowing construction in a state declaratory judgment proceeding. Regarding the propriety of such Federal Court intervention, the court stated:

> "We hold the abstention doctrine is inappropriate for cases as the present one where, unlike Douglas v. city of Jeannette, statutes are justifiably *attacked*

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[1] Justices Stewart and Harlan, concurring, explicitly stated that:

> "Finally, the court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions." Younger, at 55.

In addition, Justices Brennan, White and Marshall, concurring, distinguish Younger from Zwickler v. Koota, 389 U.S. 241 (1967), stating that "in *Zwickler* no state proceeding was pending at the time jurisdiction attached in the federal court," 401 U.S. at 57 (footnote).

> *on their face as abridging free expression or as applied for the purpose of discouraging protected activities.*" 380 U.S. at 489-90.

These same principles were reiterated in *Zwickler* v. *Koota*, 389 U.S. 241 (1967), a case, which like the one at bar, involved the propriety of Federal Court intervention when only a declaratory judgment was sought.

Both Dombrowski and Zwickler require that we do not intervene in the case at bar. We are not dealing with a statute that is facially defective in any way. Moreover, there is nothing in this record that would support a finding that this threatened application of an otherwise valid statute was "for the purpose of discouraging protected activities." (Another way of saying "for bad faith harassment.") Thus, this case seems to fall directly under the Supreme Court's ruling in *Cameron* v. *Johnson*, 390 U.S. 11 (1968). In that case, the Court held that where a challenged state law was not facially defective in any way and the record did not establish any bad faith, this was therefore:

> ". . . not a case in which '. . . a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [appellants] any protection which they could not secure by prompt trial and appeal pursued to this court." Cameron at 620, citing Douglas v. City of Jeannette, at 164.

This is precisely the situation in the case at bar. I, therefore, feel that we do not need to extend Younger. The issue, as I frame it, is fully cognizable within the parameters of what the Supreme Court has already said. To state, as does the majority, that "in this appeal *we must* meet the issue explicitly reserved in *Samuels* v. *Mackle*, 401 U.S. 66 (1971)" is, with deference, in my opinion, simply not the case.

Since, however, the majority has made such a broad pronouncement on the meaning of Younger, albeit in a case where the facts do not justify so broad a decision, I cannot help but note that the conclusion reached seems, to my mind, entirely wrong. Attempting to hold that

even when there is *no state court prosecution pending*, a litigant must show bad faith harassment to give federal jurisdiction in the case of *facial invalidity* of the statute involved, and regardless of the fact that First Amendment rights may indeed be chilled, represents more than the great deference we must and should show to our state court brethren. It represents the abdication of our duty as federal judges where called on to decide what is solely a federal question. Closing yet another federal door in the face of a litigant raising *only federal questions* is, to my mind, federalism turned on its head.[2]

Indeed, as Justice Brennan has pointed out in his concurring opinion in *Perez* v. *Ledesma*, 401 U.S. 82, 104 (1971):

> ". . . *consideration of federalism are not controlling* when no state prosecution is pending and the only question is whether declaratory relief is appropriate. In such a case, the congressional scheme that makes the federal courts *the* primary *guardians of constitutional rights*, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance." (emphasis added.)

Moreover, as the First Circuit stated in a case limiting its application of Younger to situations where prosecutions were actually pending:

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[2] It is interesting to note that in narrowing the number of cases in which removal to the Federal Courts would be granted in Civil Rights cases, Justice Stewart specifically pointed to one remedy this court seeks to cut off today. In Greenwood v. Peacock, 384 U.S. 808, at 829, the Court stated:

> "But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See Dombroski v. Pfister, 380 U.S. 479."

"While Mr. Justice Brennan's views in Perez v. Ledesma, 401 U.S. at 93 et. seq., did not prevail in view of the majority's recognition of a prior pending state prosecution, 401 U.S. at 86, n.2, we cannot dismiss the congressional history reviewed by him, 401 U.S. at 112-15, expressly contemplating resort to the milder, less intrusive, and more timely remedy of a declaratory judgment to test criminal laws, both state and federal. See e.g., Lewis v. Kugler, 446 F.2d 1343, 1347-48 (CA 3, 1971); Anderson v. Vaughn, 327 F.Supp. 101, 102 (D. Conn. 1971) (three judge court). Were the law to be that a plaintiff could not obtain a declaratory judgment that a local ordinance was unconstitutional when no state prosecution is pending unless he could allege and prove circumstances justifying a federal injunction of an existing state prosecution, the Federal Declaratory Judgment Act would have been pro tanto repealed. Wulp v. Corcoran, —— F.2d —— (1st Cir. 1972."

The majority in this opinion attempts to effectuate such a repeal at least as to threatened state criminal prosecutions. It reads Younger and its companion cases as equating declaratory with injunctive relief in entirely different settings. That is to say the practical effects of declaratory relief are supposedly the same as those of injunctive relief even if in one case a prosecution is pending, and in another it is not. Because quite different considerations of federalism are involved when no prosecution is pending, I cannot agree with the majority's equation of these two situations.

Again, as the First Circuit has noted:

"There is a clear and significant difference in the appropriateness of federal relief between pending and pre-prosecution contexts. The policies militating against intervention, canvassed in Younger v. Harris, do not apply at all or apply with greatly diminished strength in the latter context. The traditional restraint of equity, calculated to present erosion of the role of the jury and avoid a duplication of legal

> proceedings is not here present. And considerations of comity do not push nearly so strongly where there is no ongoing state proceeding to be aborted." Wulp, supra, at ——.

In addition, when a statute is being challenged as unconstitutional on its face (I again emphasize that this is not really in issue in this case), a Federal Court is not asked to make findings of fact in place of the state court. Rather, the Federal Court is asked to rule on only federal questions. In such a situation, I point to what the Supreme Court has stated in Zwickler:

> "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility equally with the federal courts . . . 'to guard, enforce and protect every right granted or secured by the Constitution of the United States . . .' Robb v. Connolly, 111 U.S. 624, 637 *'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.*" Zwickler v. Koota, 389 U.S. 241, at 248 citing Stapleton v. Mitchell, 60 F. Supp. 51, 55.

Since this is not a case involving a facially void statute, there must be bad faith harassment to provide federal jurisdiction. Here there was none shown. I think that is all we need say, in AFFIRMING the judgment of the trial court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1856

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS
RICHARD GUY STEFFEL, PLAINTIFF-APPELLANT

versus

JOHN R. THOMPSON, ETC., ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 3, 1972, 5 Cir., 1972, —— F.2d ——).

OPINION—July 20, 1972

Before TUTTLE, GEWIN and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

GEWIN and DYER, Circuit Judges, specially concurring:

The full court has considered the views of Judge Tuttle, expressed in concurrence, and has further considered the suggestion that the panel has been overruled by *Lake Carriers' Association* v. *MacMullan*, 1972, —— U.S. —— [40 U.S.L.W. 4569, May 30, 1972].

Lake Carriers' is an abstention case, and as Justice Brennan points out, "[T]he question of abstention, of

course is entirely separate from the question of granting declaratory or injunctive relief." 40 U.S.L.W. at 4572 n. 13. Significantly, he also points out that in *Lake Carriers'*, unlike *Becker*, there is an "absence of an immediate threat of prosecution." *Id.* at 4572. Justice Brennan's gratuitous statement that, in the absence of pending prosecutions, declaratory relief may be appropriate, is as he indicates, taken from his separate opinion in *Perez* v. *Ledesma*, 1971, 401 U.S. 82, and is pure dicta in *Lake Carriers'*. To suggest that the Supreme Court in collateral dicta in *Lake Carriers'* has decided that the prerequisites to federal intervention defined in *Younger* v. *Harris*, 1971, 401 U.S. 37, do not apply to declaratory judgments against threatened state criminal prosecutions is inconceivable when the issue was so carefully preserved in *Younger* and *Samuels* v. *Mackell*, 1971, 401 U.S. 66, for a time when the point was squarely raised.

The lack of a nod to the *Younger* doctrine by the Supreme Court in its recent decisions in *Police Department of the City of Chicago* v. *Mosley*, 1972, —— U.S. —— [40 U.S.L.W. 4877, June 27, 1972), and *Lloyd Corp., Ltd.* v. *Tanner*, 1972, —— U.S. —— [40 U.S.L.W. 4829, June 20, 1972], is of no moment. The grant of certiorari in each case was specifically limited to constitutional issues other than those raised by *Younger* and its progeny. *See* 1972, 404 U.S. 1037; 1972, 404 U.S. 821.

We underscore our agreement with the dissent that the district courts of this Circuit are entitled to consistent decision making on our part. Since *Younger* and *Samuels* were decided, but prior to the decision in this case, this Court twice held that declaratory relief was inappropriate in cases involving threatened state criminal prosecutions in the absence of proof of *Younger* prerequisites to intervention. *Cooley* v. *Endictor*, 5 Cir. 1972, 458 F.2d 513; *Thevis* v. *Moore*, 5 Cir. 1971, 440 F.2d 1350. Such is the holding of the case *sub judice*. No panel has held to the contrary.[1]

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[1] The dissent's suggestion that the panel opinion is inconsistent with *Hobbs* v. *Thompson*, 5 Cir. 1971, 448 F.2d 456, is inexplicable. *Hobbs* is a civil, not a criminal case, involving no possibility of interference with state criminal proceedings.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BROWN, Chief Judge, with whom WISDOM and GOLDBERG, Circuit Judges, join dissenting from the denial of rehearing en banc:

Because Senior Circuit Judge Tuttle has not participated in the Court's consideration of the petition for rehearing en banc, he does not have an opportunity to respond now to the apparent rejection of the views expressed in his concurring opinion. As one who shares his misgivings, I feel obligated to state concisely my reasons for believing that the present case is enbancworthy.

In effect the Court has held that a Federal declaratory judgment action challenging the constitutionality of a State criminal law is subject to the restrictions imposed by *Younger* v. *Harris*, 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 and companion cases, regardless of whether prosecutions under that law have been initiated. That position has heretofore been rejected by the First,[1] Third[2] and Sixth[3] Circuits and by at least two three-judge District Courts.[4] Its underlying philosophy appears to be at odds with one of our own earlier decisions, *Hobbs* v. *Thompsons*, 5 Cir., 1971, 448 F.2d 456. Moreover, its continuing vitality is somewhat suspect in light of the Supreme Court's recent pronouncement that the reasoning supporting the application of the *Younger* doctrine has "little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." *Lake Carriers' Assn.* v. *MacMullan*, 1972, —— U.S. ——,

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[1] Wulp v. Corcoran, 1 Cir., 1972, 454 F.2d 826.

[2] Lewis v. Kugler, 3 Cir., 1971, 446 F.2d 1343.

[3] Crossen v. Breckenridge, 6 Cir., 1971, 446 F.2d 833.

[4] Anderson v. Vaughn, D. Conn., 1971, 327 F. Supp. 101; Thoms v. Smith, D. Conn., 1971, 334 F. Supp. 1203.

—— S.Ct. ——, —— L.Ed.2d —— [40 U.S.L.W. 4569, May 30, 1972].

Admittedly the Court in *Lake Carriers* was concerned primarily with the problem of abstention and only indirectly with the potential applicability of the *Younger* sextet. However, in a dissenting opinion both Mr. Justice Powell and the Chief Justice concluded that abstention was inappropriate and would have remanded the case for a trial on the merits, thereby negating any inference that they regarded *Younger* as a possible bar to a declaratory judgment in the absence of a pending State criminal proceeding. Since Justices Brennan, White and Marshall have adopted an equivalent point of view,[5] and since Mr. Justice Douglas obviously shares it,[6] I have considerable difficulty avoiding the conclusion that the question which the panel's opinion purports to find "open" is now regarded as closed by two-thirds of the present membership of the Supreme Court.

There is little doubt that the legislative history of the Declaratory Judgment Act of 1934 suggests emphatic Congressional disapproval of the theory that in all circumstances "the Constitution requires litigants to subject themselves to the possible harm of a criminal prosecution before seeking relief from an allegedly unconstitutional statute * * * when actual interference with protected rights is alleged or shown." *Crossen* v. *Breckenridge, supra*, note 3, 446 F.2d at 838 (citation omitted). Judicially imposed limitations on the remedy are appropriate when a State prosecution is already underway because a Federal declaratory judgment action would almost invariably disrupt that proceeding, which by itself provides the defendant with an adequate procedural vehicle for testing the law's constitutionality. *Samuels* v. *Mackell*, 1971, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688. But such considerations are absent when the Federal plaintiff has not yet been arrested or charged and therefore, apart from a declaratory judgment action, has

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[5] Perez v. Ledesma, 1971, 401 U.S. 82, 93, 91 S.Ct. 674, ——, 27 L.Ed.2d 701, 710 (separate opinion by Brennan, J.).

[6] Dyson v. Stein, 1971, 401 U.S. 200, 211, 91 S.Ct. 769, ——, 27 L.Ed.2d 781, 789 (dissenting opinion by Douglas, J.).

no choice but to obey a potentially unconstitutional statute or to disobey it and risk fine or imprisonment on the ultimate outcome.[7] I have most serious reservations about imposing such a dilemma upon those who seek to exercise what they sincerely believe to be their Federal constitutional rights.

Nevertheless, I pass no final judgment on the result reached here. Despite the difficulties raised by the foregoing analysis there may yet be some persuasive justification for the opinion rendered by the Court. All I suggest is that the case obviously involves a problem of exceptional importance which, because of previous uncertainty and apparent inconsistency,[8] requires en banc reconsideration to insure decisional uniformity. Particularly is this true in light of Judge Tuttle's assertion that the availability of a narrower ground for decision reduces most of the panel's opinion to the level of obiter dictum. When issues of such far-reaching significance are at stake, the District Courts of this Circuit are entitled to know precisely what the law is. In its present posture this case simply does not provide that precision.[9]

I dissent from the denial of rehearing en banc.

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[7] "There is indeed a serious present controversy, involving important federal issues, and posing for the Lake Carriers an immediate choice between the possibility of criminal prosecution or the expenditure of substantial sums of money for antipollution devices and equipment which may not be compatible with the federal regulations which admittedly in due time will be pre-emptive. This presents a classic case for declaratory relief * * *." Lake Carriers' Assn. v. MacMullan, *supra*, 40 U.S.L.W. at 4574 (dissenting opinion by Powell, J.).

[8] Compare Hobbs v. Thompson, *supra*, with Musick v. Jonnson, 5 Cir., 1971, 449 F.2d 201 and Cooley v. Endictor, 5 Cir., 1972, 458 F.2d 513.

[9] In two recent decisions involving circumstances virtually identical to those present here, the Supreme Court considered the merits of the constitutional claims without even mentioning the *Younger* doctrine. Police Department of the City of Chicago v. Mosley, 1972, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— [40 U.S.L.W. 4877, June 27, 1972]; Lloyd Corp., Ltd. v. Tanner, 1972, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— [40 U.S.L.W. 4829, June 20, 1972].

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-1856

D. C. Docket No. 14260

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS
RICHARD GUY STEFFEL, PLAINTIFF-APPELLANT

versus

JOHN R. THOMPSON, ETC., ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

Before TUTTLE, GEWIN and DYER, Circuit Judges

JUDGMENT—Filed July 31, 1972

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 8, 1972

TUTTLE, Circuit Judge, CONCURRING IN RESULT.

Issued as Mandate: Jul. 28, 1972

SUPREME COURT OF THE UNITED STATES

No. 72-5581

RICHARD GUY STEFFEL, PETITIONER

v.

JOHN R. THOMPSON, ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 26, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5581

RICHARD GUY STEFFEL,

Petitioner,

v.

JOHN R. THOMPSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5581

RICHARD GUY STEFFEL,

Petitioner,

v.

JOHN R. THOMPSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 459 F.2d 919 (1972), and may be found in the separate appendix at 44 through 55. The order and opinion denying rehearing *en banc* is reported at 463 F.2d 1338 (1972), and may be found in the separate appendix at 56 through 60. The opinion of the United States District Court for the Northern District

of Georgia is reported at 334 F. Supp. 1386 (1972),[1] and may be found in the separate appendix at 36 through 41.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 3, 1972, and motion for rehearing *en banc* was denied on July 20, 1972 (A. 56). The petition for writ of certiorari was filed in this Court on October 17, 1972, and certiorari was granted on February 26, 1973.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1254(1), review of a judgment of the United States Court of Appeals for the Fifth Circuit being sought.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution.

This case also involves the following United States statute:

28 United States Code, Section 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

This case further involves the following State of Georgia statute:

26 Georgia Code Annotated, Section 1503:

"Criminal trespass. — (a) . . .

(b) A person commits criminal trespass when he knowingly and without authority:

* * * * *

(2) enters upon the land or premises of another person, . . .after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person, . . .after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor."

(Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)

QUESTION PRESENTED

Whether the standards set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), may be applied to deny petitioner declaratory relief, where there was no pending state criminal prosecution.

STATEMENT

Petitioner, RICHARD GUY STEFFEL, on October 16, 1970, brought an action in the United States District Court for the Northern District of Georgia on behalf of

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[1]The opinions below are reported *sub nom. Becker v. Thompson, et al.* Petitioner, RICHARD GUY STEFFEL, appealed from the order and judgment of the District Court and sought review in this Court, and accordingly, the caption and style of the case has been changed to bear his name. Ms. SANDRA LEE BECKER, a plaintiff below, did not appeal.

himself and members of the class which he represented (A. 5).[2] The jurisdiction of the court was invoked pursuant to the provisions of 28 United States Code, Sections 1343, 2201, 2202, and 42 United States Code, Section 1983(a). Petitioner sought a declaratory judgment as well as injunctive relief against the operation and threatened operation and enforcement of the Georgia trespass statute, *supra*, at 3, as applied to his conduct (A. 5). Petitioner claimed that the trespass statute was invoked against him in violation of the free speech provisions of the First Amendment, as the same are made applicable to the State of Georgia through the Fourteenth Amendment (A. 5).

This Action was brought against respondents, John R. Thompson, Solicitor of the Civil and Criminal Court of Dekalb County; F. D. Hand, Chief of Police of Dekalb County who has jurisdiction over the unincorporated area of that county; D. Scott Hudgins, Jr., d/b/a North Dekalb Shopping Center; and G. T. Reynolds, manager and agent for North Dekalb Shopping Center (A. 6, 7).

The material facts giving rise to this controversy are not disputed, and the Court of Appeals summarized them thusly:

"... The action takes place at the North Dekalb Shopping Center. It is a large, modern, retail

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[2]Other plaintiffs named in this action were: Sandra Becker and the Atlanta Mobilization Committee, an unincorporated association of approximately 50 active members engaged in educational and organizing efforts to influence United States policy in Southeast Asia (A. 6). Ms. Becker, an eighteen year old waitress at the Western Sizzling Steakhouse, was arrested pursuant to the trespass statute, and a prosecution was pending against her at the time the action was filed. Neither Ms. Becker nor the Atlanta Mobilization Committee appealed the District Court's denial of both injunctive and declaratory relief (A. 43).

shopping area located in a partially residential, partially small business area of unincorporated North Dekalb County, Georgia. It contains a large parking lot and a totally covered air conditioned building complex housing more than sixty retail tenants surrounded by a wide exterior sidewalk.

"Since its opening in 1965 the Center has enforced its regulations against handbilling because it desired to maintain an attractive place for its customers to shop without interference or irritation. The Boy Scouts and local garden clubs are permitted to use the booths inside the Mall for bake sales and to give information concerning their activities.

"On October 8, 1970, . . . Steffel, Becker and others stood on the exterior sidewalk of the Center and distributed hand bills informing passersby of a meeting protesting the war in Indo-China. [They] were soon instructed by a Center private security guard that they could not distribute the hand bills and were ordered to leave. When they refused the Dekalb County Police were called. When the police arrived [Steffel and Becker] were informed that, if they did not stop distribution of hand bills, they would be arrested. [They] left and no arrests were made.

"On October 10, 1970, an attorney for [Steffel and Becker] asked the manager of the Center to permit them to distribute anti-war handbills. Permission was refused. Nevertheless, Steffel and Becker returned to the Center and again, in an orderly fashion, distributed handbills from the exterior sidewalk while other members of the group[3] made photographs. Steffel and Becker were again advised

[3]The reference to "other members of the group" refers to an attorney with the local community legal aid society who took photographs (R. 157).

by the security guard and the Center's manager that they could not distribute the handbills, and that, if they persisted in doing so, they would be arrested. Ultimately the Dekalb County Police arrived and told Becker and Steffel to discontinue their activity or they would be arrested. Steffel left to avoid arrest. Becker continued to distribute the handbills[4] and was arrested on a charge of criminal trespass, pursuant to the provisions of Ga. Code §26-1503."

In obedience to the Georgia trespass statute, Steffel made no further direct effort to distribute handbills at the shopping center and stayed away.

The District Court held a hearing on the motion for preliminary injunction on October 28, 1970, but did not render a decision of Steffel's claims until after the opinions of this Court were announced in *Younger v. Harris*, 401 U.S. 37 (1971), *Samuels v. Mackell*, 401 U.S. 66 (1971), *Dyson v. Stein*, 401 U.S. 200 (1971), *Perez v. Ledesma*, 401 U.S. 82 (1971), *Boyle v. Landry*, 401 U.S. 77 (1971), and *Byrne v. Karalexis*, 401 U.S. 216 (1971).

The District Court noted that this Court left the question open for future decision as to whether or not the *Younger-Samuels* standard of irreparable injury was applicable to pre-prosecution suits for declaratory relief (A. 40). The District Court, however, applied that standard to petitioner's claim, even though there was no pending state criminal prosecution against him (A. 40). The District Court ruled that Steffel had failed to show irreparable injury or other extraordinary circumstances (A. 41). To rationalize the application of the *Younger-*

[4]The handbill advertised a forthcoming "March Against The War Saturday [October] 31", and called for a "BOYCOTT at COLONIAL STORES, This Inflationary War Continues to Starve Mexican Lettuce Pickers" (R. 15). A Colonial Store was one of the tennants in the Shipping Center (R. 148).

Samuels standard to petitioner's claim, the District Court read *Younger v. Harris, supra,* to counsel lower federal courts "not [to] hypothesize as to what the consequences of a future arrest might be. . ." (A. 41). The District Court further concluded that Steffel's claim lacked the "rudiments of an active controversy" (A. 41). The District Court drew that conclusion from the direction in *Dyson v. Stein, supra,* to the court below on remand to make the requisite *Younger-Samuels* finding and from the lack of standing to challenge an uncharged intimidation statute found in *Boyle v. Landry, supra,* (A. 40). For these two reasons, the merits of petitioner's claim were not reached.

A divided Court of Appeals affirmed the District Court's extension of the *Younger-Samuels* standard to deny declaratory relief in a pre-prosecution case (A. 50). The majority, Circuit Judges Dyer and Gewin, reasoned that,

> "If the practical effects of injunctive and declaratory judgment remedies are identical because they result in the disruption of a state's enforcement of its criminal statutes when a criminal prosecution is pending, and therefore bad faith harassment must be shown before either remedy may issue, and if, as we have seen, the same test of bad faith harassment is prerequisite to injunctive relief in a threatened criminal prosecution, it follows that a like showing must be made for declaratory relief in a threatened prosecution" (A. 48).[5]

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[5]The majority cited student notes relative to the impact of *Younger v. Harris* and *Samuels v. Mackell* from the annual summary and evaluation of this Court's work in an article generally entitled "The Supreme Court, 1970 Term", 85 *Harv. L. Rev.* 304 (1971), to buttress their reasoning.

Senior Circuit Judge Tuttle dissented from the extension of the *Younger-Samuels* standard to close the door to petitioner's claim (A. 50). Judge Tuttle felt that "the facts [did] not justify so broad a decision" and that the decision constituted "federalism turned on its head" (A. 53). Judge Tuttle, however, concurred in the results. He would have affirmed on the authority of *Cameron v. Johnson*, 390 U.S. 11 (1968), since the case did not involve a "facially void statute" and the record did not establish bad faith harassment (A. 55).

On petitioner's motion for rehearing and rehearing *en banc*, the full court was polled and a majority of its members voted not to rehear the appeal (A. 56). Chief Judge Brown and Circuit Judges Wisdom and Goldberg dissented and voted for rehearing. The majority voting against rehearing rejected this Court's decision in *Lake Carrier's Association v. MacMullan*, 406 U.S. 498 (1972), in which there was unanimity among members of this Court that the considerations which animated decisions in the *Younger-Samuels* context "have little force in the absence of a pending state proceedings" 406 U.S. 498. The dissenters noted that the decision was contrary to the law in the First, Third and Sixth Circuits and at odds with earlier decisions in the Fifth Circuit (A. 58). The dissenters were of the opinion "that the case obviously involves a problem of exceptional importance . . . which should have been reconsidered *en banc* "to insure decisional uniformity" (A. 60).

SUMMARY OF ARGUMENT

Petitioner attempted to peacefully distribute handbills along the exterior sidewalks of an enclosed shopping center complex located in Dekalb County, Georgia. Respondents prohibited petitioner from doing so by invoking the provisions of 26 Georgia Code Annotated,

§1503, which provides penal sanctions for trespass to the lands or premises of another. Petitioner sought declaratory relief in the local federal district court to the effect that Section 1503 as applied to his conduct violated his rights under the First Amendment. The district court and the Court of Appeals for the Fifth Circuit applied *Younger-Samuels* standard, announced in recent decisions of this Court, to deny declaratory relief even though there was no prosecution pending against petitioner.

Younger-Samuels did not create new law, *Younger* reaffirmed and reapplied existing principles which federal courts are to use when deciding to grant or deny injunctive relief against a pending state criminal prosecution. The primary thrust of *Younger* was to abort an emerging tendency to expand the occasions when injunctive relief could be granted under the authority of *Dombrowski v. Pfister. Samuels,* likewise, applied similar long-standing principles, respecting the availability of declaratory relief, which has been developed to prevent undue and unseemly federal judicial interference with the enforcement of a state's taxing or licensing powers.

The Court of Appeals below misapplied *Younger-Samuels.* Different considerations and a different standard control the decision to grant or deny declaratory relief in a case, such as this, where there is *no* pending state criminal prosecution. Recent decisions of this Court as well as the legislative history of the Federal Declaratory Judgment Act, reviewed by Mr. Justice Brennan in *Perez v. Ledesma,* clearly establish that a different standard is applicable, where there is no pending state criminal prosecution.

The case is both legally and factually alive. Petitioner is entitled to relief because he was handbilling *outside* the enclosed mall along the exterior sidewalks and thus has a claim under *Marsh v. Alabama.*

This is a proper case for declaratory relief, and petitioner is a proper party to secure such relief. On two occasions, Georgia's trespass law was actually applied to petitioner and his First Amendment activities, and the threat of enforcement of Section 1503 inhibits petitioner's present exercise of rights of free speech.

There is no remedy in the Georgia State courts. Georgia by statutory and decisional law expressly prohibits its courts from exercising their equity powers to grant either injunctive or declaratory relief which would interfere with the administration of its criminal laws. An undesirable impasse results from the denial of declaratory judgment which invites resort to self-help in order that a judicial remedy might become available. Only petitioner has standing to litigate the issue or issues which determine whether or not he is entitled to declaratory relief.

The complaint filed by petitioner alleges facts which show that the case is within the subject matter jurisdiction of the federal district court. If those facts are true, petitioner is entitled to relief. Due to the recent decision of this Court in *Chicago Police Department v. Mosley*, and developments in National Labor Relations Board proceedings, after the commencement of this action, the case is now infused with a real live equal protection claim. Thus, *Cameron v. Johnson* is inapposite.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS MUST BE REVERSED, BECAUSE THE COURT ERRONEOUSLY CONSTRUED *YOUNGER v. HARRIS* AND *SAMUELS v. MACKEL* AS CREATING NEW LAW AND MISAPPLIED THOSE DECISIONS TO DENY DECLARATORY RELIEF IN A CASE IN WHICH THERE WAS NO PENDING STATE CRIMINAL PROSECUTION.

A. No new law was created by the decision of this Court in *Younger v. Harris, supra,* and *Samuels v. Mackel, supra.* Those decisions clarified existing law and reaffirmed venerated principles of judicial self-restraint, where injunctive or declaratory relief is sought against a pending state court criminal prosecution. The Court made it abundantly clear that it was not charting a new course, rather it was adhering to an existing path and disapproving an emerging tendency to meander wrought by *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

The Court reminded lower court judges that the principles which animate the decisions to grant or deny injunctive relief against state criminal prosecutions in the context of "Our Federalism" are those that:

> Ex parte Young, 209 US 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily,

they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. [Citation omitted]

These principles, made clear in the Fenner case, have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. 401 U.S., at 45.[6]

Dombrowski v. Pfister, supra, introduced a troublesome variation on an established theme. The District Court in *Younger*, relying on *Dombrowski*, had "substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief without regard to any showing of bad faith or harassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment". 401 U.S., at 50.[7] Even though there are statements in

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[6]The quoted language is from the unanimous decision of this Court in *Fenner v. Boykins*, 271 U.S. 240, at 243-44 (1926) a familiar precedent of 46 years duration. The "other cases" to which this Court referred and which have been repeatedly followed are: *Spielman Motor Sales Co. v. Dodge*, 294 U.S. 89 (1935); *Beal v. Missouri Pac. R. Co.*, 312 U.S. 387 (1941); *Williams v. Miller*, 317 U.S. 599 (1942); and *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

[7]Other district courts have similarly construed *Dombrowski v. Pfister, supra*; for example, *Carmichael v. Allen*, 267 F. Supp. 985, at 993 (USDC ND Ga, 1966); and *Hunter v. Allen*, 286 F. Supp. 830, at 835 (USDC ND Ga, 1968), partial denial of relief on the merits aff'd 422 F.2d 1158 (5th Cir., 1970), reversed and remanded *sub nom., Embry v. Allen*, 401 U.S. 989 (1971), for

Dombrowski to support the District Court's construction, the Court rejected the lower court's expansive interpretation of *Dombrowski* for several reasons. First, the statements relied upon by the District Court were "unnecessary to the decision of that case because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards." *Ibid.* 50. Second, "chilling effect" . . . "should not by itself justify federal intervention, because federal injunctive relief cannot satisfactorily eliminate "chilling effect". *Ibid.* Such effect could be regenerated by lifting the injunction, where the state elected to secure "an acceptable limiting construction". *Ibid.* Third, incidental "chilling effect" created by state statutes which might arguably impinge upon First Amendments rights does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing [its] laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution". *Ibid.*, at 51-52. Fourth, the mode of testing the Constitutionality of a state statute, under *Dombrowski*, had the potential to erode the "case or controversy" requirement of the Judicial Clause of the Federal Constitution. For those reasons, the Court held that *Dombrowski "should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions"*. [Emphasis added] *Ibid.*, at 53. Thus, it is clear that new law was *not* created in *Younger v. Harris.*[8]

consideration of *Younger v. Harris, supra* and *Samuels v. Mackel, supra.*

[8]This conclusion is buttressed by the statement in the separate concurring opinion of Mr. Justice Stewart, in which the late Mr. Justice Harlan joined, that: "The questions the Court decides

In *Samuels v. Mackel, supra,* this Court held that "where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration . . . in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well". 401 U.S., at 73. The principles to which the Court was referring are those which require a showing of "extraordinary circumstances where the danger of irreparable loss is both great and immediate" or bad faith enforcement.

Several considerations, derived from "Our Federalism", factored in *Samuels* to require the same showing for declaratory relief as was required for injunctive relief. There was an analogous and existing body of law which had narrowed the circumstances in which declaratory judgment relief could be granted. In 1943, less than ten years after the enactment of the Federal Declaratory Judgment Act,[9] the Court decided *Great Lakes Dredge &*

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today are important ones. Perhaps as important, however, is a recognition of the areas into which today's holdings do not necessarily extend. In all of these cases, the Court deals with the proper policy to be followed by the federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in state court." *Ibid.*, at 54-55.

Mr. Justice Brennan, White, and Marshall concurred in the result, because they were of the opinion that Harris had not exhausted his state remedies and that the other plaintiffs lacked standing. *Ibid.*, at 57-58. Mr. Justice Douglas dissented, being of the opinoin that the unconstitutionality of the state statutes on its face for any reasons was sufficient to justify injunctive relief. *Ibid.* at 59.

[9] 48 Stat. 955, c. 512, June 14, 1934, as amended and now appearing as 28 United States Code, Section 2201, *supra,* at 2.

Dock Co. v. Huffman, 319 U.S. 293 (1943). There, several employers engaged in maritime operations brought suit against certain Louisiana officials, "seeking a declaratory judgment that the State's unemployment compensation law, which required employers to make contributions to a state compensation fund, was unconstitutional". 401 U.S., at 69. The action was dismissed by the District Court on the grounds that the challenged statute was constitutional. The dismissal was affirmed by this Court on a different ground. This Court held "that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of a declaratory judgment procedure". 319 U.S., at 299. Accordingly, the cause was ordered dismissed by this Court on traditional equitable grounds "without consideration of the merits." *Ibid.*, at 302. The principle of judicial self-restraint announced in *Great Lakes Dredge & Dock Co. v. Huffman* had "been repeatedly recognized and reaffirmed by" the Court in other cases in which declaratory relief was sought against a state tax or licensing statute.[10] 401 U.S., at 71.

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[10] Those cases, which were cited with approval in *Samuels*, are: *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (1946), denied declaratory relief sought against renegotiation of "Red Sea" charters, failure to exhaust administrative remedies. 327 U.S., at 544; *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949), declaratory judgment against state *ad valorem* taxes, adequate state remedy for assessment errors, 336 U.S., at 175; *Public Service Commission v. Wycoff Co.*, 344 U.S. 327 (1952), dissenting opinion of Mr. Justice Douglas, equitable principles authorized relief, 344 U.S., at 253. *Allegheny County v. Mashuda Co.*, 360 U.S. 185 (1959), declaratory relief proper in state eminent domain proceedings based on diversity jurisdiction; *Enochs v. Williams*, 370 U.S. 1 (1962), no declaratory relief against tax assessment; and *H.J. Heinz Co. v. Owens*, 189 F.2d 505 (9th Cir., 1959), state court determination of validity of patent not relitigable in declaratory action.

In *Younger*, the Court noted that Congress, as early as 1793, had "manifested[11] a desire to permit state courts to try like cases free from interference by federal court". 401 U.S., at 43. Partly in response to a similar manifestation[12] of Congressional policy, the Court long before *Samuels* restricted the availability of declaratory relief against the assessment and levy of a state imposed tax. Moreover, whether or not additional relief is sought under Section 2202, 28 United States Code,[13] a declaratory judgment has the potential to disrupt and abort state court proceedings through its res judicata effect. As a practical matter, the res judicata effect of a judgment would prohibit the state court from hearing and deciding *a matter* already pending before it. 401 U.S., at 72. Thus, neither *Younger* nor *Samuels* created new law, rather long-standing, familiar, and time-tested principles were expressly extended to preclude a federal court from granting declaratory judgment relief where the state criminal proceeding is pending prior to the commence-

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[11] The Court cited 1 Stat. 335, c. 22, Section 5, 1793 Act which provided: [N]or shall a writ of injunction be granted to stay proceedings in any court of a state...." 401 U.S., at 43. Comparison with the present provisions of Section 28 United States Code, Section 2283, was invited. *Ibid.*

[12] 28 United States Code, Section 1341 provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." June 25, 1948, c. 646, 62 Stat. 932.

[13] 28 United States Code, Section 2202 provides:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." June 25, 1948, c. 646, 62 Stat. 964.

ment of the federal civil suit. 401 U.S., at 72.

This Court did not decide that the rigid *Younger-Samuels* standard prohibits the grant of declaratory relief against non-pending or threatened state criminal prosecution. Mr. Justice Black wrote:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceedings is begun." 401 U.S., at 41.

To emphasize the point, Mr. Justice Stewart with whom Mr. Justice Harlan concurred, and who constituted a part of the majority in *Younger v. Harris, supra,* stated, "Finally, the Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions". (Emphasis in the original) 401 U.S., at 55.

B. The Court of Appeals erroneously applied the restrictive *Younger-Samuels* standard to affirm the District Court's denial of petitioner's prayer for declaratory relief (A. 44). To reach that result, Judge Dyer, writing for the majority, reasoned as follows:

> "If the practical effects of injunctive and declaratory judgment remedies are identical because they result in the disruption of a state's enforcement of its criminal statutes when a criminal prosecution is pending, and therefore bad faith harassment must be shown before either remedy may issue, and if, as we have seen, the same test of bad faith harassment is prerequisite to injunctive relief in a *threatened* criminal prosecution, it follows that a like showing must be made for declaratory relief in a threatened prosecution." (A. 48).

The reasoning of the majority in the Court of Appeals is buttressed by the erroneous construction of "Justice

Black's discussion of *Dombrowski* [to have] much broader implications, suggesting that even when state proceedings have not yet begun, injunctive relief—as authorized by *Dombrowski*—or declaratory relief—as authorized by *Zwickler v. Koota*, a 1967 case relying heavily on *Dombrowski*—may be conditioned on the same bad faith requirements". (A. 49). As petitioner pointed out above, Mr. Justice Black's discussion of Dombrowski was designed solely to dispel any further notion that mere allegations that a state statute on its face was either vague or overbroad authorizes injunctive relief against either pending or threatened state criminal prosecutions. See 401 U.S., at 50-53.

Indeed, *Zwickler v. Koota*, 389 U.S. 241 (1969), did draw mightily upon *Dombrowski* to overcome the District Court's[14] decision to abstain "from considering [Zwickler's] request for declaratory judgment in the absence of a showing by [Zwickler] of 'special circumstances to justify the exercise of federal court jurisdiction * * * to grant injunctive relief". 389 U.S., at 253-54. *Zwickler* held that, under *Dombrowski*, the same standard is to be applied when declaratory relief is sought against a *pending* state court prosecution, not against a threatened state criminal prosecution. In *Zwickler*, there was no pending state court prosecution; his conviction had already been reversed on state law grounds. Thus, this Court obviously did decide the availability of declaratory relief in the *Zwickler* context; that is, threatened or future state criminal prosecutions.[15]

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[14] See *Zwickler v. Koota*, 261 F. Supp. 985, at 989-91 (USDC ED NY, 1966).

[15] In a similar context, the court reaffirmed the availability of federal declaratory relief. See *Constantineau v. Wisconsin*, 400 U.S. 433 (1971).

The majority quoted an excerpt from the Harvard Law Review[16] out of context to further aid its faulty reasoning (A. 49). The majority failed to grasp the significance of the critical comment in the Law Review Note that Mr. Justice Black's "remarks attacking 'on its face' adjudication were unnecessary and inapt support for the *Younger* holding" 85 Harv. L. Rev., at 311. The majority also ignored other persuasive comments in the Law Review Note and which should have been obvious to them that,

> The *Younger* decision dealt with the question of when and under what circumstances federal intervention in state proceedings was appropriate; it did not deal with what type of adjudication should be employed once the proper forum is determined. *Thus, while a denial of relief in Younger does mean that the defendant's claim will not be entertained in the federal courts, it should not necessarily mean that the claim will not receive overbreadth scrutiny.* For the proper mode of constitutional adjudication is critical, regardless of the forum in which the constitutional claim is ultimately adjudicated. If the rigorous "on its face" approach is required to protect fundamental first amendment interests of the general public adequately, then it should be employed in the state enforcement court as well as in the federal equity hearing. *Ibid.*, at 312.

Hence, the decision of the majority in the Court of Appeals is unsupported by a single significant case precedent of any court other than the Fifth Circuit Court of Appeals[17] or an expression of scholarly approval.

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[16] *Supra*, at n. 5.

[17] The Fifth Circuit is the only circuit which has yet held that *Younger-Samuels* standard was applicable where declarory relief was sought against a threatened criminal prosecution. The "Fifth

The decision of the majority of the Court of Appeals is the product of tautological reasoning which led it to incorrectly extend or apply the *Younger-Samuels* standard to this case. The majority assumes that, since this Court considered the practical effect of granting injunctive or declaratory relief against a pending state prosecution to be the same due to the resulting disruption of a state's enforcement of its criminal laws, "The same limitation on the use of the Act necessarily applies in preprosecution cases" (A. 49). This position and supporting rationale as well was rejected by this Court in *Lake Carriers Association v. MacMullan, supra,* 406 U.S. at 509-510.

There, the Association sought injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided, *inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. at 502. The special three judge district court had held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court held that a justiciable controversy was

Circuit Rule" barring relief, usually announced in an uninformative *per curiam* opinion, against threatened criminal prosecutions has been applied in eleven cases other than this one. Those cases are: *Thevis v. Moore,* 440 F.2d 1350 (1971); *Star Satellite v. Rosetti,* 441 F.2d 651 (1971); *Coleman v. Yokum,* 442 F.2d 351 (1971); *Leflore v. Robinson,* 446 F.2d 715 (1971), to withdraw 434 F.2d 933 for reconsideration in light of *Younger*; *Musick v. Johnson,* 449 F.2d 201 (1971), reh. *en banc* den. 449 F.2d at 203; *Cooley v. Endictor,* 458 F.2d 513 (197); *Hunt v. Rodriquez,* 462 F.2d 659 (1972); *Thevis v. Seibs,* 464 F.2d 613 (1972); *Palaio v. McAuliffe,* 466 F.2d 1230 (1972); *Shaw v. Garrison,* 467 F.2d 113 (1972), relief granted requisite showing made; and *Milner v. Burson,* 470 F.2d 870 (1972).

stated but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate, because the state court could settle the question of the correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated. 406 U.S. at 512.

To reach that decision in the context of that pre-state prosecution, this Court in *Lake Carriers Association,* was compelled to consider the implication of *Younger v. Harris,* and *Samuels v. Mackell.* Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a pre-prosecution case:

> "In Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971), this Court held that, apart from the 'extraordinary circumstances, a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal system that have little force in the absence of pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma,* 401 U.S. 82, 93 (1971) (separate opinion). 406 U.S. at 509-510.

Indeed, the separate opinion cited with approval is the opinion of Mr. Justice Brennan in *Perez v. Ledesma, supra.* The majority of the Court of Appeals explicitly rejected the principles stated in that separate opinion (A. 49). In fact, this explicit rejection was the basic premise for the decision of the Court of Appeals in this case. Now that this Court has held that the stringent *Younger-Samuels* standard does not apply in a pre-

prosecution suit for declaratory relief, the decision of the Court of Appeals is in direct conflict with and contrary to *Lake Carriers Association.*[18]

Moreover, the dissent by Mr. Justice Powell, joined by the Chief Justice, in *Lake Carriers Association,* further supports petitioner's position that the stringent *Younger-*

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[18] In his special concurring opinion on the denial of rehearing *en banc,* Judge Dyer for the majority attempted to distinguish the determination in *Lake Carriers Association* that *Younger-Samuels* was inapplicable to pre-prosecution cases as "collateral dicta" and characterized Mr. Justice Brennan's analysis as a "gratuitous statement" (A. 57). Chief Circuit Judge Brown for himself, Circuit Judges Wisdom and Goldberg responded by noting that the dissents in *Lake Carriers Association* negate any inference that this Court "regarded *Younger* as a possible bar to a declaratory judgment in the absence of a pending state criminal proceeding" (A. 59). Judge Dyer found Chief Judge Brown's citation of *Hobbs v. Thompson,* 448 F.2d 456 (5th Cir. 1971), to be "inexplicable" (A. 57). In his view, *Hobbs* "is a civil case . . . involving no possibility of interference with state criminal proceedings" (A. 57).

A threshold issue in *Hobbs* was "the propriety of federal equitable intervention" in an action brought by municipal employees to be relieved of impediments raised by local ordinances to the exercise of First and Fifteenth Amendment rights. 448 F.2d, at 458. Judge Goldberg carefully examined the various limitations which have been imposed upon federal court intervention into local matters and approved the conclusion reached by Mr. Justice Brennan in *Perez.* 448 F.2d, at 465. The ordinances attacked in *Hobbs* provided quasi-criminal penalties of "reprimand, deduction of pay, suspension from duty, reduction in rank, dismissal from the department" for such conduct as taking "an active part in any primary election . . . identifying . . . in a political race with or against any candidate for office." 448 F.2d, at 457. Indeed, relief from the imposition of state criminal sanctions was not sought, but the interest of the city in preventing corruption among its firemen is one certainly no less entitled to "prompt and unencumbered enforcement" of the degree a state has with respect to its criminal laws. See Mr. Justice Stewart's concurring opinion in *Younger v. Harris,* 401 U.S., at 55 n. 2.

Samuels standard was inapplicable to this pre-prosecution action for declaratory relief.

Mr. Justice Powell's dissent holds the view that the complaint did state a justiciable controversy, and that therefore, the three judge district court, rather than have abstained, should have reached the merits and decided the issue before it. 406 U.S. at 513. Of necessity, the dissent involves approval and endorsement of the Court's majority opinion in Lake Carriers Association that the stringent *Younger-Samuels* standard is not applicable in the pre-prosecution context.

The Court continued to limit application of the *Younger-Samuels* standard to pending prosecutions in the recent abortion cases. In *Roe v. Wade*, ___ U.S. ___ (1973) (41 U.S.L.W. 4213), Mr. Justice Blackmun applied *Younger-Samuels* standard to preclude federal injunctive or declaratory relief for Dr. Hallford, because he sought "relief with respect to the same statutes under which he stands charged in criminal prosecutions *simultaneously pending* in state court" 41 U.S.L.W., at 4217. [Emphasis added]. However, the Court sanctioned the grant of declaratory relief to plaintiff Roe against whom there was no pending state prosecution. For, "[t]he Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota* . . .; *Dombrowski v. Pfister* . . . We are not dealing with a statute, that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris* . . ." 41 U.S.L.W., at 4229.

In the other abortion case, declaratory relief was available to the physicians who were subject to possible future criminal prosecution for consulting with pregnant

women who desired abortions. *Doe v. Bolton*, ___ U.S. ___ (1973) (41 U.S.L.W. 4233). The Court said:

> The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenridge*, 446 F.2d 833, 839-840 (CA6 1971); *Poe v. Menghini*, 339 F. Supp. 986, 990-991 (Kans. 1972). 41 U.S.L.W., at 4236.

The Court pointed out that injunctive and declaratory relief do not have the identical impact or effect upon federal-state relations. Mr. Justice Blackmun concluded both opinions with almost identical language to the effect that, "We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." *Roe v. Wade*, 41 U.S.L.W., at 4229. And, in Doe v. Bolton, "The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe v. Wade, ante.* We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court." 41 U.S.L.W., at 4240.

However, if the Court had had before it cases involving pending state criminal prosecution, its statements would have little practical meaning. Where the prosecution is pending, if injunctive relief is granted, negative or mandatory directions are actually imposed upon state

officials. The relief granted would *compel* them, with respect to the enforcement of the state's criminal laws, to conform their conduct to what any one of several hundred different federal district court judges might order, under the threat of contempt proceedings. If declaratory relief were granted, its effect would be to generate strife rather than operate as "an essential instrument of social peace." See Borchard, "Judicial Relief for Peril and Insecurity," 45 Harv. L. Rev. 793, at 801 (1931-32). But, where, as here, there is no pending state criminal prosecution, there is simply nothing cognizable to be disrupted by the grant of declaratory relief. Inchoate state enforcement activity may very well have to be adjusted, but the disruption which *Younger-Samuels* discountenanced is: the wrenching away from the state courts the power to hear and decide matters which have been reserved to them under the Constitution, not those which are the prime responsibility of the federal courts, under "Our Federalism." In the pre-prosecution situation, the effect of withholding federal declaratory relief is as Judge Tuttle stated "federalism turned on its head" (A. 53). "Our Federalism" is a two-way street. Accordingly, federal judges, as Judge Tuttle admonished, cannot abdicate their duty "to decide what is solely a federal question" (A. 53).[19]

[19] The legislative history of the Federal Declaratory Judgment Act, which Mr. Justice Brennan reviews in his separate concurring opinion in *Perez v. Ledesma*, 401 U.S., at 112-25, leaves little doubt that declaratory relief was conceived of as a milder remedy to prevent anticipatory invasions of federal Constitutional rights. Other lower federal courts have also perceived this to have been the intent of Congress to provide a remedy which would effectively avoid the direct, immediate conflict between federal and state authority caused by injunctive relief while permitting federal vindication of federal Constitutional rights. Only the Fifth Circuit,

II.

THE JUDGMENT BELOW MUST BE REVERSED, BECAUSE THIS IS A PROPER CASE FOR THE GRANT OF DECLARATORY RELIEF AND PETITIONER IS A PROPER PARTY FOR SUCH RELIEF

A. This Is a Proper Case for the Grant of Declaratory Relief

This is a "classic case for declaratory relief". *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 513, Justice Powell's dissenting opinion. The district court asserted the lack of the "rudiments of an active controversy between the parties" as alternative bases for its decision. The District Court was incorrect. An active and lively controversy existed between Steffel and the respondents. Steffel had been subjected to actual applications of the Georgia trespass statute on two occasions, October 8 and 10, 1970 (A. 8, 9). Steffel's departure was required by the statute. See 26 Ga. Code Ann., Sec. 1503, *supra*, at 2. Had he refused to leave or had returned, he would have been arrested. Steffel's

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even though one would have expected that regional peculiarities might have made that court more chary to close yet another door to federal relief, has adopted a contrary view. Some of the decisions of other lower federal courts are: *Wulp v. Corcoran*, 454 F.2d 826 (1 Cir. 1971); *Lewis v. Kugler*, 446 F.2d 1343 (3 Cir. 1971); and *Crossen v. Breckenridge*, 446 F.2d 833 (6 Cir. 1971). It is also contrary to decisions of district courts in the Second Circuit: *Anderson v. Vaughn*, 327 F. Supp. 101 (D. Conn., 1971); and *Thoms v. Smith*, 334 F.Supp. 1203 (D. Conn., 1971).

In *Crossen v. Vaughn, supra*, a challenge to Kentucky's anti-abortion laws, decided June 23, 1971, *Younger v. Harris, supra*, and *Samuels v. Mackell, supra*, were not even cited by Circuit Judge Miller. Crossen applied the *Zwickler v. Koota*, standard. 446 F.2d, at 841. In *Lewis v. Kugler, supra*, an action on behalf of, among others, "long-haired highway travelers, the Third

compliance with the statute was coerced by the risk of enforcement. Obediance to law works its application as well as defiance. Surely, Steffel is not required to resort to civil disobediance to obtain standing. Steffel was under a present obligation not to return to the Shopping Center for the purpose of passing out handbills. As this Court said in *Lake Carriers Association* "that in and of itself makes [his] attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion." 406 U.S. at 507. Furthermore, the District Court found that respondents, Hudgins and Reynolds, "will continue to insist on the strict enforcement of their regulations, and, therefore, will repeatedly swear out warrants for [Steffel's] arrest, and pursue active prosecution under the trespass statute" (A. 38).

A declaration of rights would be beneficial to the petitioner. A substantial question is presented on the merits of the controversy as to the extent the owner of private property must tolerate First Amendment activity

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Circuit expressly held that *Younger-Samuels* standard "is not applicable to situations where no prosecution is pending in state courts. . ." 346 F.2d, at 1347. In the Connecticut red flag case, *Anderson v. Vaughn*, Circuit Judge Smith for the majority of the three Judge district court panel held that *Younger-Samuels* were not controlling since there was no "criminal prosecution pending . . ." 327 F. Supp., at 102. Judge Clarie dissented, on the merits; he thought the statute valid. Judge Blumenfeld in the Connecticut flag defiling case, *Thoms v. Smith, supra*, did not apply *Younger-Samuels* "because there is no pending prosecution . . ." 334 F. Supp., at 1200. Judge Clarie would have abstained on the basis of *Younger*, since another person who had been convicted in state court under the challenged statute, had appealed. 334 F. Supp., at 1216. The majority pointed out that abstention was equally improper, since there were no privity or interest nexus between the federal litigants and the state court appellant. 334 F. Supp., at 1206 n. 4.

on the *plainly* public portion of his property. This Court has never held that a person could be deprived of the right to peacefully handbill on the *exterior* sidewalks of privately-owned property generally accessible to the public. A Jehovah's Witness' right to distribute leaflets along the public sidewalks of a company town was upheld in *Marsh v. Alabama;* 326 U.S. 501 (1946). "Ownership does not always mean absolute dominion." 326 U.S. at 506.

In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), this Court imposed a restriction upon the use to which strangers could make of private property open to the general public. There, the Court required some nexus between the First Amendment activity and the occupiers and owners of private property. The nexus in *Amalgamated Food Employees Union* was picketing to inform the public of the use of non-union labor by one of the tenants of the shopping Center. One could consider the restriction reasonable, since the "picketing was carried on almost entirely in the parcel pickup area and the portion of the parking lot immediately adjacent thereto." 391 U.S., at 311. The potential for interference and disruption could be a reasonable basis for limiting the range of activity which would be protected. However, *Chicago Police Department v. Mosley,* ___ U.S. ___ (1972) (40 U.S.L.W. 4877), greatly undermined the business nexus rationale. In *Chicago Police Department,* a Chicago ordinance which permitted only union picketing near a public school was declared to be a denial of the equal protection of the law. Another restriction was imposed upon peaceful picketing/handbilling by *Lloyd Corp. Ltd. v. Tanner,* ___ U.S. ___ (1972) (40 U.S.L.W. 4829). *Lloyd Corp. Ltd.* held that the owner of a large shopping center could exclude peaceful handbillers from

the "distribution of handbills *within* the building complex and its malls". 92 S.Ct. 2219, at 2222. (Emphasis added). That case did not hold that peaceful handbillers could be excluded from the use of *exterior* sidewalks. One of the supporting rationales for *Lloyd Corp. Ltd.* was the availability of reasonable adequate alternative sites from which handbills could be distributed which would reach patrons entering or leaving the shopping center complex. Mr. Justice Powell took special care to point out that, "All persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles ... Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets". 92 S.Ct. 2228. Since the court below did not reach the merits, it would be an appropriate disposition to remand for a finding whether or not the exterior sidewalks from which petitioner was excluded are sufficiently dedicated to the public as to permit the exercise of First Amendment rights.[20]

There is no remedy available to Steffel in the State of Georgia, unless he defied the law by either remaining on the premises or returning after having been told to leave.

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[20] The District Court would not be adrift with respect to the appropriate standard to apply to reach its determination of whether or not declaratory relief is proper in the context of the history of this preprosecution action. This Court has already established a number of devices to prevent abuse of the lower Court's equitable powers; for instance: abstension, case or controversy, imminence of prosecution or standing. What must be borne in mind is that the applicable principles are judicially created and, therefore, are completely subject to judicial control. They may be expanded or restrictured to meet the exigencies of each case so that a proper balance is maintained between federal and state interests.

Georgia has enacted a Declaratory Judgment Act, 110 Ga. Code Ann., Section 1101, *et seq.* However, decisions of the Georgia Supreme Court have made it clear that the Act is not available to vindicate rights threatened by the enforcement or operation of criminal statutes or ordinances. *Royal Peacock Social Club v. City of Atlanta*, 226 Ga. 817, 177 S.E.2d 664 (1970); *Clark v. Karrh*, 223 Ga. 851, 159 S.E.2d 75 (1968).

By statute, the powers of equity courts in Georgia may not be exercised to interfere in the administration of the state's criminal laws by either granting injunctive or declaratory relief. 55 Ga. Code Ann., Sec. 102, provides:

> Equity will take no part in the administration of the criminal law. It will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them.

See *Butler v. Ellis*, 203 Ga. 683, 47 S.E.2d 861 (1948), "declaratory judgment action would not lie ". . . to determine criminal liability for serving liquor to private club member.

The decision below is a standing invitation to breach the peace. An impasse has been created. Neither petitioner nor the respondents have a remedy. Respondents cannot vindicate their position, unless they violate the law by arresting petitioner on sight should he return to the shopping center or arresting him if he should linger too long following a request to desist his handbilling. Likewise, petitioner cannot vindicate his constitutional rights unless he violates the law. Access to the Courts becomes dependent upon wrongdoing. Respondents' position has more than cast a "chilling effect" over petitioner's rights; it placed them in deep freeze. The maintenance of this ironic status quo is an intolerable expense to precious First Amendment freedoms. The

Federal Declaratory Judgment Act is the remedy intended to break this impasse. Its remedial purpose is to "bring about the public guaranty of the reign of law and the private vindication of legal rights." 45 Har. L. Rev., at 801.

Moreover, the immersion of this Court in the sit-in cases during the mid-sixties should be sufficient counsel against the wisdom of infusing notions of civil disobedience into the law. Civil disobedience is sanctioned here when the doors of federal court are closed to petitioners, leaving the property of respondents and the jails of the state as forums in which to assert their constitutional rights. Civil disobedience brings about an increased risk of violence, with prospective inconvenience to the general public, and inevitable economic losses due to business interruption from the loss of patronage or increased insurance premiums. Consider *State of Georgia v. Rachel,* 384 U.S. 780 (1966), in which this Court held that Title II of the Civil Rights Act of 1964 immunized nonviolent refusals to leave the premises of another for racial reasons. But, there is no equivalent statute in the area of handbilling and picketing.

Self-help to resolve the impasse is plainly foreseeable. Georgia's trespass statute, Section 1503, *supra,* at 3, is not a moribund enactment. Section 1503 was enacted in 1968 to replace former Georgia Code Sections 26-3002 through 26-3005. Committee Notes, *Code of Georgia, Annotated,* Chapter 26-15, "Criminal Damage to Property", 99-101. "The general import of [this] section is that a person must receive notice before he is guilty of criminal trespass". *Ibid.,* at 101. Section 1503 supersedes in its entirety former Section 3005, which was deeply implicated in Georgia's resistance to the movement to eradicate racism in places of public accommodation. This Court twice considered the enforcement practices under

former Section 3005 in *State of Georgia v. Rachel, supra,* the civil rights removal action; and in *Walker v. Georgia,* 381 U.S. 355 (1965), criminal conviction on direct appeal. Thus, it is unlikely that respondents will desist from further enforcement of such a recently enacted statute, incorporating as it does a widely used prior law.

B. Petitioner Is a "Proper Party" for Declaratory Relief

One element of an active controversy is whether the plaintiff is a proper party. This question concerned the Court in *Boyle v. Landry, supra.* While there were criminal prosecutions pending against some of the plaintiffs in *Boyle,* the Court's opinion turned on the absence of a showing of irreparable injury to any plaintiff because of any enforcement of the Illinois intimidation statute (the only statute before the Court on appeal). The Court noted that, "Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional." 401 U.S., at 80. The Court stated further that, "In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times." 501 U.S., at 81. The infirmity of the plaintiffs' case in *Boyle* was not that federal court relief would interfere with any pending state prosecution but that none of the plaintiffs, for the reasons above stated, was a proper party to bring the lawsuit.

This holding was consistent with the Court's consideration of "proper party" in *Younger.* There, the Court analyzed the standing of Harris' co-plaintiffs, who had

not been "indicted, arrested, or even threatened by the prosecutor." The Court stated that "if these three had alleged that they would be prosected for the conduct they planned to engage in, and the District Court had found this allegation to be true either on the admission of the State's district attorney or on any other evidence–then a *genuine controversy* might be said to exist." 401 U.S., at 42 (emphasis added). As to those three proposed plaintiffs, the Court then concluded that their fears of state prosecution were imaginary and speculative.

Petitioner meets the "proper party" test stated in *Younger* and applied in *Boyle.* He alleges in his complaint that he will be arrested and prosecuted for criminal trespass if he were to return to the North DeKalb Shopping Center and distribute leaflets (A. 9). Furthermore, at the hearing, he testified that he had been to the Shopping Center on prior occasions to distribute leaflets and that each time the only reason he did not persist was that he was threatened with arrest if he failed to leave the premises. (R. 139-40, 144-145). The arrest of Ms. Becker when she refused to leave the shopping center confirms the validity of petitioner's fears. Nothing in the record controverts his allegations or testimony of threatened arrest, and therefore, under the *Younger* test, he is an appropriate party with a "genuine controversy". The *Boyle* opinion merely serves as an example of the *Younger* test, and in *Boyle* a sufficient controversy for determination was absent only because nothing in the record suggested threatened arrests under the challenged statute.

Ms. Becker, a plaintiff below, who was arrested could not and cannot assert petitioner's interests in the state court criminal proceedings. Neither an acquittal or conviction of Ms. Becker would aid petitioner. There are

too many variables in a criminal trial (e.g. credibility of witnesses or the sufficiency of the evidence to support a request for instruction to identify but two) so neither petitioner nor the Court should entertain a realistic expectation that such a trial would settle the issue of federal Constitutional law presented in this action. The judgment of conviction or acquittal following a state court trial, unless appealed, which Ms. Becker may not care to do, would have neither *res judicata* nor *stare decisis* value to the petitioner.[21] Ms. Becker does not even have arguable standing to litigate the issues the petitioner must raise to vindicate his rights. She was arrested and charged under Section 1503(b)(3), *supra,* at 2, remaining on the premises after notice to depart. Petitioner, on the other hand, was and is threatened with arrest under Section 1503(b)(2), re-entry after notice that entry is forbidden. Further, regardless of whether or not petitioner is ever arrested, charged, and tried for trespass, the statute adversely impacts in a real and concrete way upon his First Amendment rights. The continued operation and threatened enforcement of Section 1503(b)(2) deprives petitioner of a desirable location, otherwise available to the public at large, at which he may engage in First Amendment activity. In the abortion cases, the Court recognized that the situational relationship of the respective parties to the controversy was dispositive of their entitlement to declaratory relief against threatened state criminal prosecutions.

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[21] There is no *res judicata* effect of civil court litigation on criminal prosecutions. See *Helvering v. Mitchell,* 303 U.S. 391 (1938). The Fifth Circuit has recognized and followed this rule. See *Tomlinson v. Lefkowitz,* 334 F.2d 262, 264 (5th Cir. 1964) and *Young & Co. v. Shea,* 397 F.2d 185 (5th Cir. 1968).

III.

CAMERON v. JOHNSON IS INAPPLICABLE TO THIS CASE, BECAUSE PETITIONER STATED A CLAIM FOR WHICH DECLARATORY RELIEF MAY BE GRANTED

Petitioner claimed that he was engaged in the Constitutionally protected activity of distributing handbills "on an exterior sidewalk of the North Dekalb Shopping Center" on October 8th and October 10th of 1970 "inviting people to 'March Against the War' " (A. 8). He alleged that his handbilling activity was "quiet, peaceful, and orderly, and did not interfere with the selling activities of the shopping center" (A. 8). Petitioner alleged that there was no littering (A. 8). The complaint further alleged that petitioner was prevented from carrying on his peaceful activities by DeKalb County Policeman who threatened to arrest him if he did not leave the premises as ordered by the manager of the shopping center (A. 8). Steffel alleged that he desired to return to the premises and handbill but was afraid to do so for fear that he would be arrested under the provisions of Section 1503, 26 Ga. Code Ann., *supra*, at 2. He prayed for a declaration that the enforcement of the Georgia anti-trespass statute violated his rights under the First Amendment (A. 12). The jurisdiction of the Court was invoked under the provisions of 28 United States Code, Section 1343, and 42 United States Code, Section 1983 (A. 5). These allegations were sufficient to state a claim "arising under" the Constitution and laws of the United States. See *Hague v. CIO*, 307 U.S. 496 (1939), and *Truax v. Raich*, 239 U.S. 33 (1915); and *Crane v. Johnson*, 242 U.S. 339 (1917).[22]

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[22] This case is now infused with an equal protection claim. In a proceeding before the National Labor Relations Board, respondent

Contrary to Judge Tuttle's view, *Cameron v. Johnson*, 390 U.S. 11 (1968), is not applicable to this case. *Cameron* held that relief was properly denied where the petitioners failed to show the existence of a facially vague or overbroad statute and where the evidence at the hearing did not show irreparable injury or bad faith enforcement. See 390 U.S., at 616-21. *Cameron* was not concerned with the question of whether declaratory relief was appropriate against threatened state criminal prosecutions.[23]

Scott Hudgens conceded that labor pickets "had a right to utilize the parking areas and sidewalks surrounding the enclosed mall, but not the "enclosed mall" itself. *Scott Hudgens, an Individual and Local 315, Retail, Wholesale & Department Store Union, AFL-CIO,* Decision and Order, Case 10-CA–8823, August 16, 1971, at 6, 192 NLRB No. 111. This Court has squarely held that a distinction could not be drawn and maintained in favor of labor organizations, with respect to the right to exercise First Amendment rights in places openly accessible to the general public. *Chicago Police Department v. Mosley, supra.*

[23] In *Cameron,* there was active litigation in the state courts. The petitioners there had challenged their arrests in state court by filing affidavits to quash on the grounds that the statute was unconstitutional. Thus, the District Court abstained on the grounds that the petitioners had an adequate remedy at law. *Cameron v. Johnson,* 244 F. Supp. 846 (USDC SD Miss., 1964).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded with directions to grant petitioner and members of his class a hearing to determine the appropriateness of granting the relief sought on the merits.

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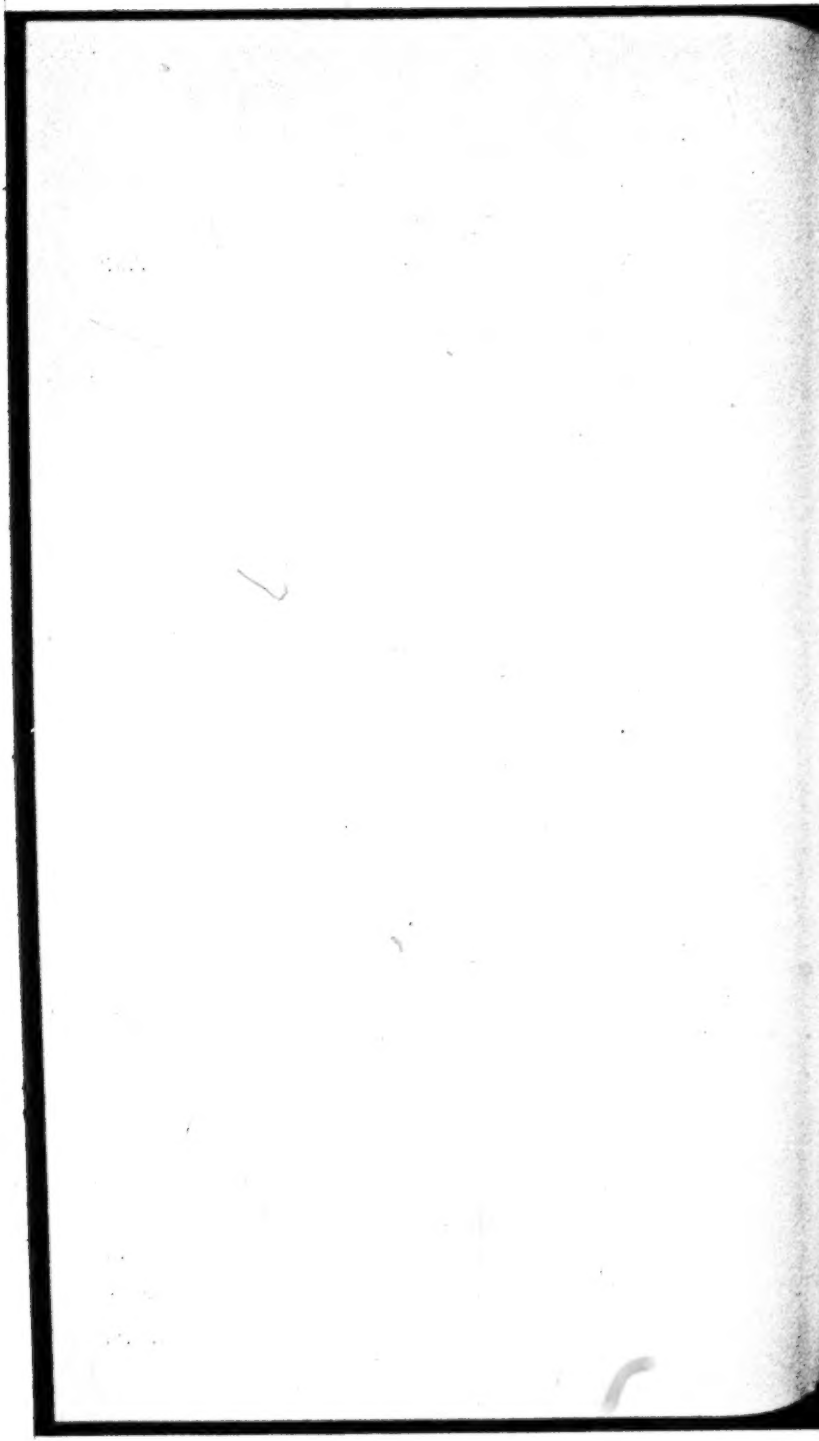

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5581

RICHARD GUY STEFFEL,

Petitioner,

vs.

JOHN R. THOMPSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS HUDGENS AND REYNOLDS

QUESTION PRESENTED

Whether the federal courts below properly declined to issue a declaration of rights as to the constitutionality of the threatened good faith application of an admittedly valid state criminal trespass statute.

STATEMENT OF THE CASE

The relevant facts are not in dispute and are correctly summarized in petitioner's statement of the case (pp. 3-8) and the decision of the court of appeals (A. 44-46). Only a few highlights, therefore, require restatement.

On October 8, 1970, petitioner and others sought to distribute anti-war handbills on the private property of respondent Hudgens'

shopping center.[1] When asked by Center security personnel to cease such activities, pursuant to a long standing and uniformly enforced Center policy prohibiting handbilling,[2] the handbillers refused to do so. Police were subsequently summoned and threatened the handbillers with arrest under the Georgia criminal trespass law, Ga. Code § 26-1503, if they did not stop handbilling. The handbillers then departed only to return and recommence their handbilling two days later. Again, after a refusal to desist upon the request of Center security personnel, police were called and arrests threatened. Steffel thereupon ceased handbilling but another member of the group, Becker, did not and was arrested. This action was instituted within the week in

1. The Center, consisting principally of a large parking area and a totally covered air-conditioned mall building containing approximately sixty tenant stores, is located in a partially residential, partially small business area of unincorporated DeKalb County, Georgia. A. 44. The Center is privately owned and maintained, with entrance to the public permitted only during business hours and then only pursuant to Center rules as enforced by the Center's own security personnel (A. 19-20), with a substantial, continuing investment having been made in order to provide an attractive place for customers to shop without interference or irritation. A. 44-45. The Center is significantly smaller than the Lloyd Center involved in *Lloyd Corporation Ltd.* v. *Tanner*, 407 U. S. 551 (1972), and, in further contrast to that center, does not contain any public streets and sidewalks (cf. 407 U. S. at 553) nor permit, as discussed in the following footnote, even a limited use of its mall by civic and charitable organizations (cf. 407 U. S. at 555).

2. Since the Center's inception in 1965, its rule against handbilling, solicitation and related activities of a non-promotional nature has been enforced without discrimination. The only exception has been that the Boy Scouts and local garden clubs have been permitted to use unrented mall booths for certain limited public relations purposes. A. 44-45. Hudgens, in fact, has been engaged in extensive litigation which is presently again before the National Labor Relations Board on remand from the Fifth Circuit as the result of the Center's exclusion of union pickets from its premises. (*Scott Hudgens*, 192 NLRB No. 11 (1971), *rem'd*, ... F. 2d ..... (5th Cir. 1971)) and is also now seeking a declaration of rights as to that question, as well as the similar prohibition of Steffel, in the Georgia state courts. *Scott Hudgens* v. *Local 315, R. W. D. S. U., et al.*, Case No. B-81424, Fulton City, Ga. Superior Ct., brought under the Georgia Declaratory Judgment Act, Ga. Code § 110-1101, *et seq.*

federal district court, seeking declaratory and injunctive relief, to attack the constitutionality of the Georgia criminal trespass law as applied to Steffel and Becker's handbilling. A. 5-12. Following the decisions in *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), the District Court denied the requested relief. A. 36-41. An appeal was taken only with respect to the refusal to grant a declaration of rights to Steffel, and a panel of the Court of Appeals for the Fifth Circuit unanimously affirmed. A. 44-55. This decision was affirmed again by a 12-3 majority of the full Court of Appeals on a petition for rehearing *en banc*. A. 56-60.

SUMMARY OF ARGUMENT

The petitioner argues that the courts below applied an erroneous standard for determining the propriety of granting federal declaratory relief concerning threatened state criminal prosecution; that the bad faith harassment test of *Younger-Samuels* is inapplicable in such a case. The crux of the petitioner's contentions is that, in the absence of a *pending* state prosecution, even if there is a *threatened* prosecution, the controlling criterion is the more expansive test applied prior to *Younger-Samuels*, i.e., that based on *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), and *Zwickler* v. *Koota*, 389 U. S. 241 (1969). There are several salient defects in this argument:

First, this Court has long recognized that federal interference with a state's good faith administration of its criminal laws is basically inimical to our federal system. Constitutional defenses to state criminal statutes, accordingly, are required to be raised in state proceedings, subject to ultimate review by this Court. Nonetheless, prior to *Younger-Samuels*, federal equitable intervention was presumed permissible to enjoin or declare unconstitutional state laws, either facially invalid or enforced in bad faith, regardless of whether a state proceeding was threatened or pending. Petitioner, however, as Judge Tuttle noted in his

concurring opinion below (A. 50-5), does not meet either criterion. There is no assertion in this case that the Georgia criminal trespass statute is facially defective. Nor is there any claim that state authorities have exercised bad faith in the enforcement of that statute or engaged in other forms of harassment. Thus, even if *Younger-Samuels* is found inapplicable or to be merely a restatement of *Dombrowski-Zwickler*, nevertheless, as this Court concluded in the factually indistinguishable situation present in *Cameron* v. *Johnson*, 390 U. S. 11 (1968), the decision below should be affirmed.

Second, *Younger* held that federal injunctions against either threatened or pending state proceedings should be sanctioned only where the state remedy is patently inadequate and there is a need to prevent great and immediate irreparable injury. *Samuels* applied the "same equitable principles" (401 U. S. at 73) to the grant of federal declaratory relief where there is a pending state proceeding. The present controversy—declaratory relief sought with respect to a threatened state proceeding—would also result, as the court below concluded, in a similar impermissible disruption of state criminal processes. The instant dispute must be differentiated from those cases, such as *Roe* v. *Wade*, 93 S. Ct. 705 (1973), and *Lake Carriers Association* v. *MacMullen*, 406 U. S. 498 (1972), which involved no immediate threat of prosecution. There, federal intervention offended neither principles of comity nor equity. Here, however, in contrast to those instances, and like the *Samuels* pending prosecution situation, Steffel has acted. There has already been a commitment on the part of state law enforcement officials. The petitioner has chosen his tribunal—the state courts—and should utilize that forum for vindication of his constitutional rights.

Finally, contrary to petitioner's assertion (brief, pp. 27-32), this case does not raise a substantial question as to the merits of the underlying constitutional controversy. That issue has been squarely resolved by this Court, subsequent to the commencement of this action, by *Lloyd Corporation, Ltd.* v. *Tanner*,

407 U. S. 551 (1972). No legitimate "chilling effect" on petitioner's constitutional rights, therefore, now exists. There is also a pending state criminal proceeding against Becker and a pending state declaratory judgment action, involving both Steffel and Hudgens (see fn. 2, *supra*), in both or either of which the issues sought to be decided here may be resolved. This case, in short, is hardly the "classic case for declaratory relief" asserted by petitioner (brief, p. 26).

ARGUMENT

I. Petitioner Has Failed to State a Proper Claim for Declaratory Relief Even Under the Pre Younger-Samuels Standard

Prior to *Younger-Samuels*, there was no automatic right to a federal declaratory judgment construing a state criminal statute. To the contrary, prevailing "considerations of federalism," then, as now, "tempered this exercise of equitable power" and "recognized that federal interference with a State's good faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Dombrowski*, 380 U. S. at 484. Federal equitable relief, whether injunctive or a declaration of rights,[3] was permissible only where state statutes were either "justifiably

3. There are, of course, as *Zwickler* recognized, different considerations for declaratory and injunctive relief requiring that "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute." 389 U. S. at 254. This distinction does not suggest, however, that the *Dombrowski* standard for enjoining a threatened state prosecution was inapplicable where, as in *Zwickler*, a declaration of rights was sought in such a case. Nowhere in *Zwickler*, for example, is there any implication that, in the absence of either bad faith harassment or facial invalidity, a declaratory judgment would still be in order. Conversely, the discussion of the absention doctrine in both *Dombrowski* (380 U. S. at 489-492) and *Zwickler* (389 U. S. at 254-255) specifically limits the inapplicability of that doctrine to only those instances where "statutes are justifiably attacked on their face as abridging free expression, or as applied for purposes of discouraging protected activities." *Dombrowski*, 380 U. S. at 489-490. After all, as *Samuels* subsequently recognized, ordinarily "the practical effects of the two forms of relief will be virtually identical . . ." 401 U. S. at 73.

attacked on their face as abridging free expression" (*Zwickler*, 389 U. S. at 254; *Dombrowski*, 380 U. S. at 489-490) or invoked by state officials "in bad faith to impose continuing harassment in order to discourage appellants' activities . . ." *Dombrowski*, 380 U. S. at 490. Where these prerequisites were absent—where, for example, as in *Cameron*, there was no facial invalidity or bad faith harassment (390 U. S. at 615-17, 619)—*both* federal injunctive and declaratory remedies were unavailable. Significantly, although both *Dombrowski* and *Zwickler* involved threatened, as contrasted with pending, state proceedings, neither decision drew any such distinction. Nor did *Cameron*, where there were both pending and threatened prosecutions. The same standard, whether that applicable to injunctions or to declaratory judgments, was thus assumed dispositive whether a prosecution was pending or merely threatened. See, to the same effect, *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943);[4] *Fenner* v. *Boykin*, 271 U. S. 240 (1926); *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163 (1943); and fn. 5, *infra*.

The petitioner errs, in short, in asserting that the pre *Younger-Samuels* law, if applied in this case, would require a declaration of rights. Steffel has not shown either that the Georgia criminal trespass statute is facially invalid or is likely to be enforced in bad faith. Neither of these prerequisites for a declaratory judgment, whether *Younger-Samuels* or *Dombrowski-Zwickler* is controlling, have thus been met. The instant case, accordingly, as Judge Tuttle, who significantly otherwise disagreed with the panel majority and concurred in the views expressed by Mr. Justice Brennan in *Perez* (A. 52-55), concluded, "seems to fall directly under . . . *Cameron* . . . we do not need to extend

4. *Great Lakes* admittedly involved "the unique considerations presented by anticipatory tax litigation." *Perez*, 401 U. S. at 127 (Brennan, J., concurring). Nevertheless, the rationale of that case—the likelihood of interference with state proceedings—is similarly present here. Cf. *Samuels*, 401 U. S. at 69-73; *Boyle* v. *Landry*, 401 U. S. 77, 81 (1971).

Younger." A. 52.[5] This reasoning, it is submitted, is eminently correct and, on this ground alone, the decision below should be affirmed.

II. The Younger-Samuels Standard Was Correctly Applied by the Court of Appeals

Petitioner (brief, p. 20) acknowledges that *Younger* curtailed the availability of injunctive relief against a threatened, as well as a pending, state proceeding. See also the decision below (A. 46-48); *Younger*, 401 U. S. at 45; *Boyle* v. *Landry*, 401 U. S. 77 (1971); and Comment, *The Supreme Court, 1970 Term*. 85 Harv. L. Rev. 301, 304-5 (1971). Steffel's quarrel with the decisions below is their extension of this reasoning to declaratory judgments. This argument disregards the critical distinction between the instant case, where there is an imminent threat of state prosecution triggered by the petitioner's own willful and repeated conduct, and those situations where there is no such likelihood of a state determination.

Roe v. *Wade* and *Doe* v. *Bolton*, 93 S. Ct. 739 (1973), two of the cases primarily relied upon by the petitioner (brief, pp. 23-24), are illustrative of this difference. There several potential

5. Petitioner admits that "relief was properly denied" in *Cameron* "where the petitioners failed to show the existence of a facially vague or overbroad statute and where the evidence at the hearing did not show irreparable injury or bad faith enforcement." Pet. brief, p. 36. Petitioner seeks to distinguish *Cameron* from this case, however, on the ground that the Court there was not concerned with declaratory relief sought "against threatened state criminal proceedings." *Ibid.* This contention is specious. *First*, as demonstrated above, there was no difference, under the *Dombrowski-Zwickler* rule applied in *Cameron*, between the declaratory judgment standard to be applied with respect to threatened, as contrasted to pending, state prosecutions. The same prerequisites were required in each instance. Nowhere in *Cameron*, for example, is there even the slightest suggestion that the Court would have reached a contrary result if here had been only threatened prosecutions. *Second*, insofar as the criminal statute in *Cameron* was "selectively enforced" and not all pickets prosecuted (see 390 U. S. at 620-21), that case, in fact, involved *both* threatened and pending state proceedings.

plaintiffs sought to attack various state anti-abortion laws. A physician, Dr. Hallford, who had been charged with a violation of the state statute and was awaiting prosecution, was held to lack standing since there was no allegation of harassment and bad faith in the state proceeding. *Roe*, 93 S. Ct. at 713. Other potential litigants, who alleged only a speculative future application of the state law, were also held not to be appropriate plaintiffs. *Id.* at 714. The plaintiffs, accordingly, were restricted to pregnant women (Jane Roe and Mary Doe) and physicians, who, while neither presently being prosecuted nor threatened with prosecution, had asserted a direct threat of personal detriment. *Id.* at 712-713; *Doe*, 93 S. Ct. at 745. See, to the same effect, *Lake Carriers Association* v. *MacMullen*, 406 U. S. 498 (1972), where, like Jane Roe and Mary Doe, the plaintiff, although not subject to "an immediate threat of prosecution," nevertheless possessed a claim "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 406 U. S. at 506, 509; see also the decision below on rehearing (A. 56-7). The present plaintiff—who has twice defied state law, triggered threats of arrests and caused the commitment of state law enforcement authorities—is more akin to Dr. Hallford than Jane Roe and Mary Doe. He too has an adequate opportunity to vindicate his constitutional claims in state court; there is no question in Steffel's case, in contrast to that of the legitimate plaintiffs in *Roe* and *Doe*, that the state will act should there be a continuation of his challenged course of conduct. The state court, in the instant case, is, therefore, the appropriate forum in which to adjudicate petitioner's constitutional defenses.

Federal interference with state criminal processes, as Mr. Justice Frankfurter once observed, is "perhaps the most sensitive source of friction between States and Nation." *Stefanelli* v. *Minard*, 342 U. S. 117 (1951). State trespass laws, in particular, involve matters that are "historically a concern of state law" and "conduct that touches interests 'deeply rooted in local feeling and responsibility.'" *Taggart* v. *Weinacker's*, 397 U. S. 223, 227-228 (1970) (Burger, C. J., concurring). Federal declara-

tory relief in this case would freeze, as evident by the indefinite continuance of Becker's prosecution (A. 46, n. 2), the administration of the Georgia criminal trespass law. Petitioner, moreover, has already repeatedly and willfully acted in defiance of that law; and the state law enforcement authorities are already committed to proceed in good faith thereunder against Steffel consistent with their prosecution of Becker. The comity and equity principles which prompted *Younger-Samuels*, accordingly, in contrast to *Roe, Doe* and *Lake Carriers*, are fully applicable here. Petitioner's failure to meet the *Younger-Samuels* standard was properly held to preclude declaratory relief.[6]

III. There Is No Substantial Question as to the Merits of the Underlying Constitutional Controversy

Petitioner alleges (brief, p. 26) that the instant dispute presents "a classic case for declaratory relief." The precise contrary conclusion, in fact, is that required. A declaration of rights in this case is both unnecessary and duplicative of state remedies.

A. Steffel's constitutional claim in this case rests upon asserted rights arising under *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), and *Marsh* v. *Alabama*, 326 U. S. 501 (1946). A. 46. Those decisions, however, subsequently have been expressly held to be inapplicable in the situation *sub judice*. In *Lloyd Corporation, Ltd.* v.

6. The various appellate court decisions relied upon by petitioner (brief, p. 25, n. 19) are not to the contrary. In *Wulp* v. *Corcoran*, 454 F. 2d 826 (1st Cir. 1972), the plaintiffs contended both that prior-licensing ordinance and that the threatened prosecution by the city officials constituted bad faith harassment. Similarly, in *Lewis* v. *Kugler*, 446 F. 2d 1343 (3rd Cir. 1971), the plaintiffs alleged a pattern of bad faith harassment by New Jersey police consisting of repeated unconstitutional searches and seizures without arrest or prosecution. And in *Crossen* v. *Breckenridge*, 446 F. 2d 833 (6th Cir. 1971), there was a claim that the Kentucky anti-abortion law was facially invalid under the Ninth Amendment.

Tanner, 407 U. S. 501 (1972), decided with *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972), this Court upheld the right of a private shopping center, far larger and more public than the Center in this case, to prohibit handbilling unrelated to the center's operations. Fifth Amendment property rights were required to yield to First Amendment free speech rights only where (1) the private property has assumed "to some significant degree the functional attributes of public property devoted to public use" (*Central Hardware*, 407 U. S. at 547); (2) no "adequate alternative avenues of communication exist" (*Lloyd*, 407 U. S. at 567); and (3) there is a "relationship . . . between the purpose of the expressive activity and the business of the shopping center" (*Lloyd*, 407 U. S. at 564).[7]

None of these three requirements have been met in this case. Petitioner's purported distinction (brief, pp. 27-9) between this case and *Lloyd*, that in this case the Center precluded handbilling on private exterior sidewalks whereas in *Lloyd* the prohibition was directed against such activities on the walkways of a partially enclosed private mall, is specious. Regardless of where on private Center property Steffel previously engaged in or now desires to engage in handbilling, since the Center is not the functional equivalent of public property, and there are ample effective alternative public areas for the communication of his unrelated message, it "would be an unwarranted infringement of [Hudgens] property rights to require them to yield under [such] circumstances . . ." *Lloyd*, 407 U. S. at 567. This is the clear

7. *Police Department* v. *Mosley*, 408 U. S. 92 (1972), in no way "clearly undermine[s]," as petitioner suggests (brief, p. 28), *Lloyd*. *Mosley*, decided only *four* days after *Lloyd*, does not even mention that decision. The reason is that *Mosley* involved a totally inapposite issue: the reconciliation of the need to permit the free expression of ideas *in public places*. *Lloyd* and the instant case, however, are concerned with a different question: namely, to what extent must a *private property* owner make available his property for public use. See *Diamond* v. *Bland*, ... Cal. App. 2d .... (July 10, 1973).

teaching of *Lloyd*.[8] There is no substantial question presented here by simply seeking a reiteration of that lesson.

B. Petitioner also claims (brief, pp. 29-30) that the only state remedy available to him requires arrest and a criminal trial; that there is no Georgia declaratory judgment proceeding whereby he can obtain vindication of his constitutional rights. Hudgens, in fact, has initiated precisely such an action (see fn. 2, *supra*) which, in its opinion, is well-founded in Georgia law. Cf., e.g., *Harper* v. *Burgess*, 225 Ga. 420, 422 (1969); *Jenkins* v. *Manry*, 216 Ga. 539, 540 (1961); *Calvary Indep. Baptist Church* v. *Rome*, 208 Ga. 312 (1957); *Stein Printing Company* v. *Atlanta Typographical Union Local 48*, Civil Action Nos. B-66457 and 67125, Fulton Cty, Ga., Superior Ct. (1972). A state declaration of Steffel's rights is, therefore, not only possible but likely. There is no need in this case to invoke the spectre of either a "breach of the peace" or "self-help." Pet. brief, pp. 30-2.

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8. Petitioner erroneously asserts (brief, p. 34) that the threatened enforcement of the Georgia criminal trespass law "deprives petitioner of a desirable location, otherwise available to the public at large, at which he may engage in First Amendment activity." As previously noted (fn. 2, *supra*), however, the Center's prohibition against handbilling is enforced uniformly and without discrimination. The Center is simply not available for any member of the public who desires to engage in non-commercial First Amendment activities thereon; here, as in *Lloyd*, the Center has extended an invitation to the public only to come onto the Center to do business with the tenant stores. "There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interest of both the stores and the shoppers whom they serve." *Lloyd*, 407 U. S. at 565.

CONCLUSION

For the reasons described above, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

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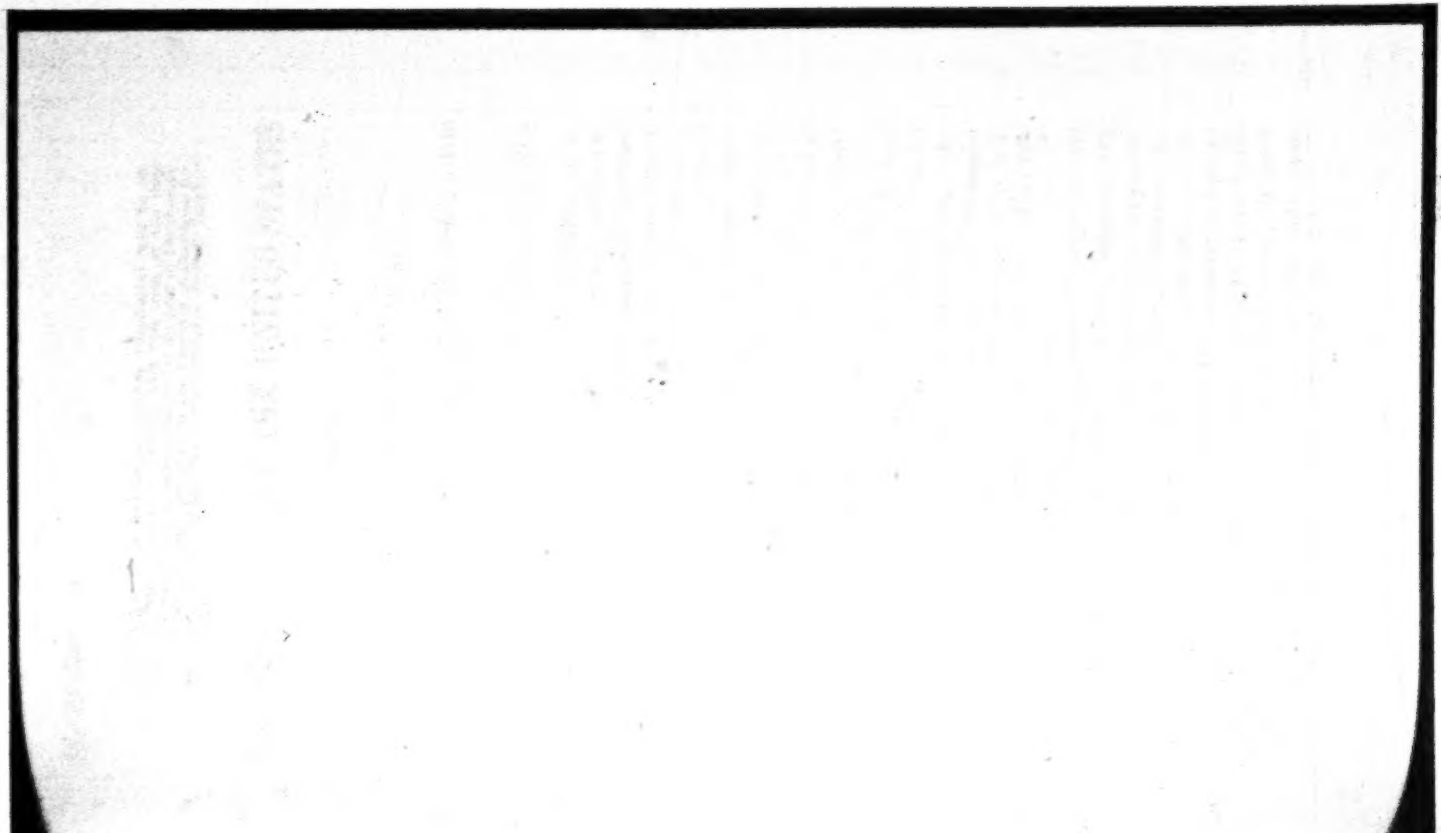

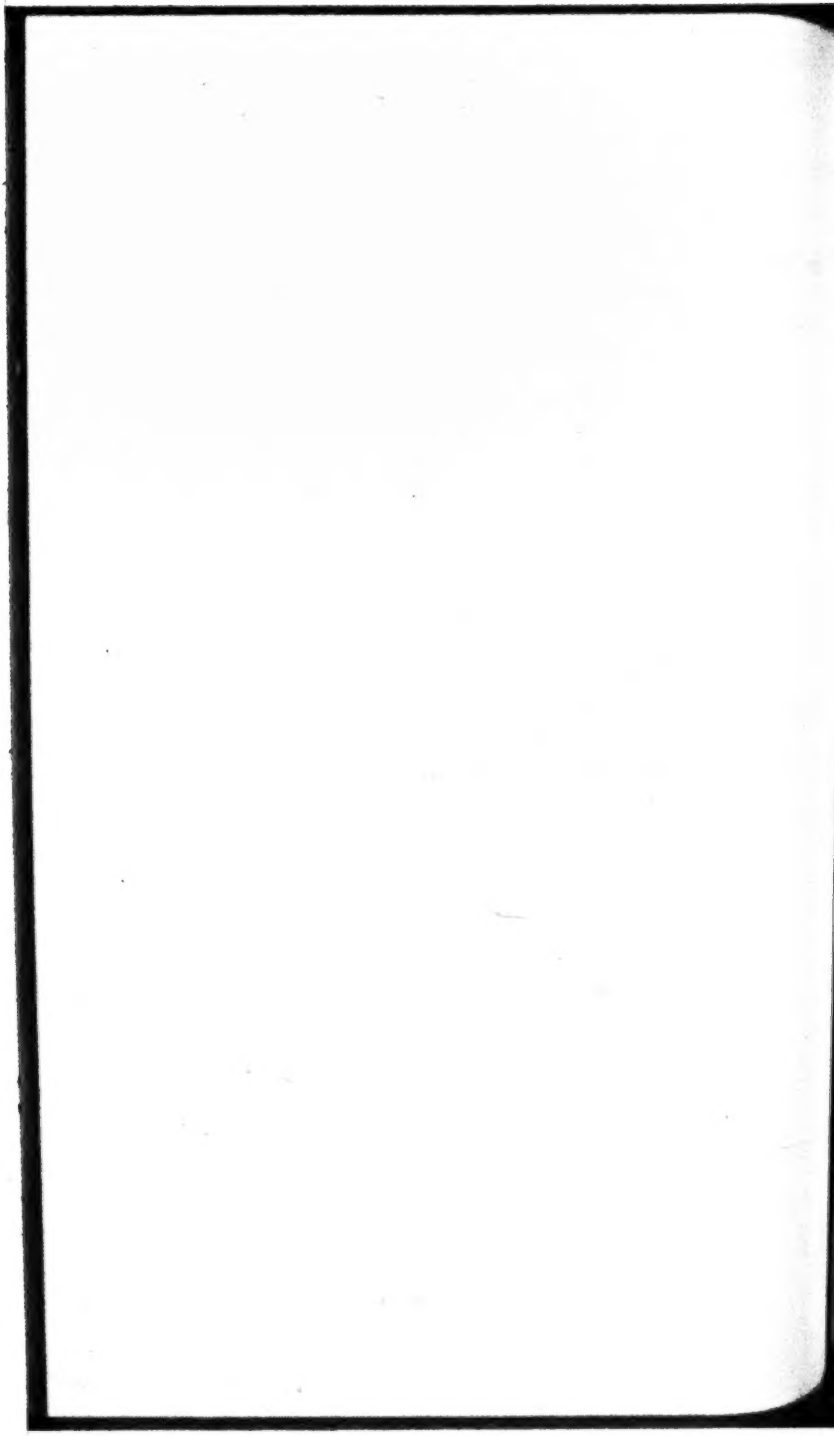

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

STEFFEL *v.* THOMPSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72–5581. Argued November 13, 1973—Decided March 19, 1974

Petitioner, who had twice been warned to stop handbilling on an exterior sidewalk of a shopping center and threatened with arrest by police if he failed to do so, and whose companion continued handbilling and was charged with violating the Georgia criminal trespass law, brought an action for injunctive and declaratory relief in the District Court, claiming that application to him of that law would violate his First and Fourteenth Amendment rights. The District Court dismissed the action, finding that "no meaningful contention can be made that the state has or will . . . act in bad faith," and therefore "the rudiments of an active controversy between the parties . . . [are] lacking." The Court of Appeals affirmed, being of the view that *Younger* v. *Harris*, 401 U. S. 37, made it clear that irreparable injury must be measured by bad-faith harassment and such a test must be applied to a request for injunctive relief against *threatened*, as well as pending, state court criminal prosecution; and that it followed from the reasoning of *Samuels* v. *Mackell*, 401 U. S. 66, that the same test of bad-faith harassment is a prerequisite for declaratory relief with respect to a threatened prosecution. *Held:*

1. This case presents an "actual controversy" under Art. III of the Constitution and the Federal Declaratory Judgment Act, the alleged threats of prosecution in the circumstances alleged not being "imaginary or speculative" and it being unnecessary for petitioner to expose himself to actual arrest or prosecution to make his constitutional challenge. Whether the controversy remains substantial and continuing in the light of the effect of the recent reduction of the Nation's involvement in Vietnam on petitioner's desire to engage in the handbilling at the shopping center must be resolved by the District Court on remand. Pp. 5–7.

Syllabus

2. Federal declaratory relief is not precluded when a prosecution based upon an assertedly unconstitutional state statute has been threatened, but is not pending, even if a showing of bad-faith enforcement or other special circumstances has not been made. Pp. 8–23.

(a) When no state criminal proceeding is pending at the time the federal complaint is filed, considerations of equity, comity, and federalism on which *Younger* v. *Harris*, and *Samuels* v. *Mackell*, both *supra*, were based, have little vitality: federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles. Pp. 8–10.

(b) Even if the Court of Appeals correctly viewed injunctive relief as inappropriate (a question not reached here, petitioner having abandoned his request for that remedy), the court erred in treating the requests for injunctive and declaratory relief as a single issue and in holding that a failure to demonstrate irreparable injury precluded the granting of declaratory relief. Congress plainly intended that a declaratory judgment be available as a milder alternative than the injunction to test the constitutionality of state criminal statutes. Pp. 10–20.

3. In determining whether it is appropriate to grant declaratory relief when no state criminal proceeding is pending, it is immaterial whether the attack is made on the constitutionality of a state criminal statute on its face or as applied. *Cameron* v. *Johnson*, 390 U. S. 611, distinguished. Pp. 20–23.

459 F. 2d 919, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. STEWART, J., filed a concurring opinion, in which BURGER, C. J., joined. WHITE, J., filed a concurring opinion. REHNQUIST, J., filed a concurring opinion, in which BURGER, C. J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72–5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 19, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), held, respectively, that, unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels* v. *Mackell*, 401 U. S., at 73–74, whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad faith enforcement or other special circumstances has not been made.

Petitioner, and others, filed a complaint in the District Court for the Northern District of Georgia, invoking the Civil Rights Act, 42 U. S. C. § 1983, and its jurisdictional implementation, 28 U. S. C. § 1343. The complaint requested a declaratory judgment pursuant to 28 U. S. C.

§§ 2201–2202, that Ga. Code Ann. § 26–1503 [1] was being applied in violation of petitioner's First and Fourteenth Amendment rights, and an injunction restraining respondents—the Solicitor of the Civil and Criminal Court of DeKalb County, the Chief of the DeKalb County Police, the owner of the North DeKalb Shopping Center, and the manager of that shopping center—from enforcing the statute so as to interfere with petitioner's constitutionally protected activities.

The parties stipulated to the relevant facts: On October 8, 1970, while petitioner and other individuals were distributing handbills protesting American involvement in Viet Nam on an exterior sidewalk of the North DeKalb Shopping Center, shopping center employees asked them to stop handbilling and leave.[2] They declined to do so,

[1] The statute provides:

"(a) A person commits criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is $100 or less, or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

"(b) A person commits criminal trespass when he knowingly and without authority:

"(1) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, for an unlawful purpose; or

"(2) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

"(3) Remains upon the land or premises of another person, or within the vehicle, railroad car, aircraft, or watercraft of another person, after receiving notice from the owner or rightful occupant to depart.

"(c) A person convicted of criminal trespass shall be punished as for a misdemeanor."

[2] At a hearing in the District Court, petitioner testified that on another occasion, prior to June 1970, he had also been threatened

and police officers were summoned. The officers told them that they would be arrested if they did not stop handbilling. The group then left to avoid arrest. Two days later petitioner and a companion returned to the shopping center and again began handbilling. The manager of the center called the police, and petitioner and his companion were once again told that failure to stop their handbilling would result in their arrests. Petitioner left to avoid arrest. His companion stayed, however, continued handbilling, and was arrested and subsequently arraigned on a charge of criminal trespass in violation of § 26–1503.[2] Petitioner alleged in his complaint that, although he desired to return to the shopping center to distribute handbills, he had not done so because of his concern that he too would be arrested for violation of § 26–1503; the parties stipulated that, if petitioner returned and refused upon request to stop handbilling, a warrant would be sworn out and he might be arrested and charged with a violation of the Georgia statute.[4]

After hearing, the District Court denied all relief and dismissed the action, finding that "no meaningful contention can be made that the state has or will in the future act in bad faith," and therefore "the rudiments of an active controversy between the parties . . . [are] lacking." 334 F. Supp. 1386, 1389–1390 (1971). Petitioner

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with arrest for handbilling at the shopping center. At that time, the police had shown him the statute they intended to enforce, presumably § 26–1503. Tr., pp. 11–12.

[3] We were advised at oral argument that the trial of petitioner's companion, Sandra Lee Becker, has been stayed pending decision of this case. See Tr. of Oral Arg., p. 31.

[4] At the District Court hearing, counsel for the police officers indicated that arrests in fact would be made if warrants sworn out by shopping center personnel were facially proper. Tr., p. 5.

appealed[5] only from the denial of declaratory relief.[6] The Court of Appeals for the Fifth Circuit, one judge concurring in the result, affirmed the District Court's judgment refusing declaratory relief.[7] 459 F. 2d 919 (1972). The court recognized that the holdings of

[5] The complaint was initially styled as a class action. Named as plaintiffs were petitioner, a minor suing through his father, Sandra Lee Becker, petitioner's handbilling companion against whom a prosecution was pending under the Georgia statute, see n. 3, *supra*, also a minor suing through her father, and the Atlanta Mobilization Committee. The complaint had also sought to enjoin plaintiff Becker's pending prosecution. Only petitioner appealed from the District Court's decision denying all relief.

[6] Petitioner's notice of appeal challenged the denial of both injunctive and declaratory relief. However, in his appellate brief, he abandoned his appeal from denial of injunctive relief. *Becker* v. *Thompson*, 459 F. 2d 919, 921 (1972).

[7] Since the complaint had originally sought to enjoin enforcement of the state statute on grounds of unconstitutionality, a three-judge district court should have been convened. See 28 U. S. C. § 2281; *Goosby* v. *Osser*, 409 U. S. 512 (1973); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962). A three-judge court is required even if the constitutional attack—as here—is upon the statute as applied, see *Department of Employment* v. *United States*, 385 U. S. 355 (1966); *Query* v. *United States*, 316 U. S. 486 (1942); *Ex parte Bransford*, 310 U. S. 354, 361 (1940); see generally Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37–50 (1964); and is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of discretion will usually be necessary, see *Jones* v. *Wade*, 479 F. 2d 1176, 1180 (1973); *Abele* v. *Markle*, 452 F. 2d 1121, 1125 (1971); see generally Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 309 (1963). But since petitioner's request for injunctive relief was abandoned on appeal, see n. 6, *supra*, and only a request for declaratory relief remained, the Court of Appeals did not err in exercising jurisdiction over appeal. Cf. *Roe* v. *Wade*, 410 U. S. 113, 123 (1973); *Mitchell* v. *Donovan*, 398 U. S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 152–155 (1963); *Stratton* v. *St. L. S. R. Co.*, 282 U. S. 10, 16 (1930).

Younger v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), were expressly limited to situations where state prosecutions were pending when the federal action commenced, but was of the view that *Younger* v. *Harris* "made it clear beyond peradventure that irreparable injury must be measured by bad faith harassment and such test must be applied to a request for injunctive relief against *threatened* state court criminal prosecution" as well as against a pending prosecution; and, furthermore, since the opinion in *Samuels* v. *Mackell* reasoned that declaratory relief would normally disrupt the state criminal justice system in the manner of injunctive relief, it followed that "the same test of bad faith harassment is prerequisite . . . for declaratory relief in a threatened prosecution." 459 F. 2d, at 922. A petition for rehearing *en banc* was denied, three judges dissenting. 463 F. 2d 1338 (1972).[8]

We granted certiorari, 410 U. S. 953, and now reverse.

I

At the threshold we must consider whether petitioner presents an "actual controversy," a requirement imposed by Art. III of the Constitution and the express terms

[8] Other federal courts have entertained applications for injunctive and declaratory relief in the absence of a pending state prosecution. See, *e. g.*, *Thoms* v. *Heffernan*, 473 F. 2d 478 (CA2 1973), aff'g 334 F. Supp. 1203 (Conn. 1971) (three-judge court); *Wulp* v. *Corcoran*, 454 F. 2d 826 (CA1 1972); *Crossen* v. *Breckenridge*, 446 F. 2d 833 (CA6 1971); *Lewis* v. *Kugler*, 446 F. 2d 1343 (CA3 1971); *Anderson* v. *Vaughn*, 327 F. Supp. 101 (Conn. 1971) (three-judge court). Even the Fifth Circuit of Appeals has limited the scope of the instant decision by entertaining an action for declaratory and injunctive relief in the absence of a state prosecution when the federal suit attacked the facial validity of a state statute rather than the validity of the statute as applied. See *Jones* v. *Wade*, 479 F. 2d 1176 (1973) (Wisdom, J.).

of the Federal Declaratory Judgment Act, 28 U. S. C. § 2201.[9]

Unlike three of the appellees in *Younger* v. *Harris*, 401 U. S., at 41, petitioner has alleged threats of prosecution that cannot be characterized as "imaginary or speculative," *id.*, at 42. He has been twice warned to stop handbilling that he claims is constitutionally protected and has been told by the police that, if he again handbills at the shopping center and disobeys a warning to stop, he will likely be prosecuted. The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been "chimerical," *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961). In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. See, *e. g.*, *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). Moreover, petitioner's challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution against him. Cf. *Boyle* v. *Landry*, 401 U. S. 77, 81 (1971); *Watson* v. *Buck*, 313 U. S. 387, 399–400 (1941).

Nonetheless, there remains a question as to the *con-*

[9] Section 2201 provides:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Section 2202 further provides:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

tinuing existence of a live and acute controversy that must be resolved on the remand we order today.[10] In *Golden* v. *Zwickler*, 394 U. S. 103 (1969), the appellee sought a declaratory judgment that a state criminal statute prohibiting the distribution of anonymous election-campaign literature was unconstitutional. The appellee's complaint had expressed a desire to distribute handbills during the forthcoming re-election campaign of a Congressman, but it was later learned that the Congressman had retired from the House of Representatives to become a New York Supreme Court Justice. In that circumstance, we found no extant controversy, since the record revealed that appellee's sole target of distribution had been the Congressman and there was no immediate prospect of the Congressman again becoming a candidate for public office. Here, petitioner's complaint indicates that his handbilling activities were directed "against the war in Vietnam and the United States foreign policy in Southeast Asia." Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world, it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); see *Zwickler* v. *Koota*, 389 U. S. 241, 244 n. 3 (1967).

[10] The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113, 125 (1973); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403 (1972); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

II

We now turn to the question of whether the District Court and the Court of Appeals correctly found petitioner's request for declaratory relief inappropriate.

Sensitive to principles of equity, comity, and federalism, we recognized in *Younger* v. *Harris, supra,* that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions. We were cognizant that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts "to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ." *Robb* v. *Connolly,* 111 U. S. 624, 637 (1884). In *Samuels* v. *Mackell, supra,* the Court also found that the same principles ordinarily would be flouted by issuance of a federal declaratory judgment when a state proceeding was pending, since the intrusive effect of declaratory relief "will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." 401 U. S., at 72.[11] We therefore held in *Samuels* that, "in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by

[11] The Court noted that under 28 U. S. C. § 2202 a declaratory judgment might serve as the basis for issuance of a later injunction to give effect to the declaratory judgment, see n. 9, *supra,* and that a declaratory judgment might have a *res judicata* effect on the pending state proceeding. 401 U. S., at 72.

federal district courts in determining whether to issue a declaratory judgment . . . ." 401 U. S., at 73.

Neither *Younger* nor *Samuels*, however, decided the question whether federal intervention might be permissible in the absence of a pending state prosecution. In *Younger*, the Court said.

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal prosecution is begun." 401 U. S., at 41.

See also *id.*, at 55 (STEWART and Harlan, JJ., concurring); *id.*, at 57 (BRENNAN, WHITE, and MARSHALL, JJ., concurring). Similarly, in *Samuels* v. *Mackell*, the Court stated:

> "We, of course, express no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun." 401 U. S., at 73–74.

See also *id.*, at 55 (STEWART and Harlan, JJ., concurring); *id.*, at 75–76 (BRENNAN, WHITE, and MARSHALL, JJ., concurring).

These reservations anticipated the Court's recognition that the relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding." *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 (1972). When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on

the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 490 (1965).

When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief. Here, the Court of Appeals held that, because injunctive relief would not be appropriate since petitioner failed to demonstrate irreparable injury—a traditional prerequisite to injunctive relief, *e. g.*, *Dombrowski* v. *Pfister*, *supra*—, it followed that declaratory relief was also inappropriate. Even if the Court of Appeals correctly viewed injunctive relief as inappropriate—a question we need not reach today since petitioner has abandoned his request for that remedy, see n. 6 *supra*—,[12] the court erred in treating the requests for injunctive and declara-

[12] We note that, in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution *for past conduct*, sufficient injury has not been found to warrant injunctive relief, see *Beal* v. *Missouri P. R. Corp.*, 312 U. S. 45 (1941); *Spielman Motor Sales Co., Inc.* v. *Dodge*, 295 U. S. 89 (1935); *Fenner* v. *Boykin*, 271 U. S. 240 (1926). There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to *forego* constitutionally protected activity in order to avoid arrest. Compare *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Hygrade Provision Co., Inc.* v. *Sherman*, 266 U. S. 497 (1925); and *Terrace* v. *Thompson*, 263 U. S. 197, 214, 216 (1923), with *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943); see generally Note, Implications of the *Younger* Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending, 72 Col. L. Rev. 874 (1972).

tory relief as a single issue. "[W]hen no state prosecution is pending and the only question is whether declaratory relief is appropriate [,] . . . the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance." *Perez* v. *Ledesma*, 401 U. S. 82, 104 (1971) (separate opinion).

The subject matter jurisdiction of the lower federal courts was greatly expanded in the wake of the Civil War. A pervasive sense of nationalism led to enactment of the Civil Rights Act of 1871, 17 Stat. 13, empowering the lower federal courts to determine the constitutionality of actions, taken by persons under color of state law, allegedly depriving other individuals of rights guaranteed by the Constitution and federal law, see 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3).[13] Four years later, in the Judiciary Act of March 3, 1875, 18 Stat. 470, Congress conferred upon the lower federal courts, for but the second time in their nearly century-old history, general federal question jurisdiction subject only to a jurisdictional amount requirement, see 28 U. S. C. § 1331.[14] With this latter enactment, the lower federal courts "ceased to

[13] "Sensitiveness to 'states' rights', fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer trusted to the enforcement of state agencies." Frankfurter & Landis, The Business of the Supreme Court 64 (1928).

[14] In the last days of the Adams' Administration, general federal question jurisdiction had been granted to the federal courts by § 11 of the Midnight Judges Act, 2 Stat. 92 (1801). The Act was repealed only one year later by § 1 of the Act of Mar. 8, 1802, 2 Stat. 132.

be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Frankfurter & Landis, The Business of the Supreme Court 65 (1928) (emphasis added).[15] These two statutes, together with the Court's decision in *Ex parte Young*, 209 U. S. 123 (1908)—holding that state officials who threaten to enforce an unconstitutional state statute may be enjoined by a federal court of equity and that a federal court may, in appropriate circumstances, enjoin future state criminal prosecutions under the unconstitutional act—have "established the modern framework for federal protection of constitutional rights from state interference." *Perez* v. *Ledesma*, 401 U. S., at 107 (separate opinion).

A "storm of controversy" raged in the wake of *Ex parte Young*, focusing principally on the power of a single federal judge to grant *ex parte* interlocutory injunctions against the enforcement of state statutes, Hart & Wechsler, The Federal Courts and the Federal System 967 (2d ed. 1973); see generally *Goldstein* v. *Cox*, 396 U. S. 471 (1970); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 804–805 (1934). This uproar was only partially quelled by Congress' passage of legislation, 36 Stat. 557, requiring the convening of a three-judge District Court [16] before a preliminary injunc-

[15] The histories of the Civil Rights Act of 1871 and the Judiciary Act of 1875 are detailed in *Zwickler* v. *Koota*, 389 U. S. 241, 245–247 (1967).

[16] The three-judge court procedure, with expedited review, was modeled after the Expediting Act, 32 Stat. 823 (1903), now 15 U. S. C. §§ 28–29, 49 U. S. C. §§ 44–45, requiring that for certain antitrust cases certified by the Attorney General to be of particular public importance a three-judge court be convened with direct appeal to the Supreme Court, as well as a 1906 act, 34 Stat. 584, 592,

tion against enforcement of a state statute could issue, and providing for direct appeal to this Court from a decision granting or denying such relief.[17] See 28 U. S. C. §§ 2281, 1253. From a State's viewpoint the granting of injunctive relief—even by these courts of special dignity—"rather clumsily" crippled state enforcement of its statutes pending further review, see H. R. Rep. No. 288, 70th Cong., 1st Sess., 2 (1928); H. R. Rep. No. 94, 71st Cong., 2d Sess., 2 (1929); H. R. Rep. No. 627, 72d Cong., 1st Sess., 2 (1932). Furthermore, plaintiffs were dissatisfied with this method of testing the constitutionality of state statutes, since it placed upon them the burden of demonstrating the traditional prerequisites to equitable relief—most importantly, irreparable injury. See, *e. g.*, *Fenner* v. *Boykin*, 271 U. S. 240, 243 (1926).

To dispel these difficulties, Congress in 1934 enacted the Declaratory Judgment Act, 28 U. S. C. §§ 2201–2202. That Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the

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applying the same procedure to suits brought to restrain, annul, or set aside orders of the Interstate Commerce Commission. See Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 810 (1934).

[17] The three-judge court provision was amended in 1913 to apply also to interlocutory injunctions restraining enforcement of state administrative or commission orders. 37 Stat. 1013. It was further amended in 1925 to extend the three-judge requirement and the direct-appeal provisions to the final hearing on a permanent injunction, thereby ending the anomolous situation in which a single judge, at the final hearing, could overrule the decision of three judges granting an interlocutory injunction. 43 Stat. 936, 938. When the statute was codified in 1948, it was made applicable to all actions seeking either a preliminary or permanent injunction, *Goldstein* v. *Cox*, 396 U. S. 471, 478 n. 3 (1970). See generally Hart & Wechsler, The Federal Courts and the Federal System 967–968 (2d ed. 1973); Wright, Federal Courts § 50, at 188–189 (2d ed. 1970).

injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable is amply evidenced by the legislative history of the Act, traced in full detail in *Perez* v. *Ledesma*, 401 U. S. 82, 111–115 (separate opinion). The highlights of that history, particularly pertinent to our inquiry today, emphasize that

> "[I]n 1934, without expanding or reducing the subject matter jurisdiction of the federal courts, or in any way diminishing the continuing vitality of *Ex parte Young* with respect to federal injunctions, Congress empowered the federal courts to grant a new remedy, the declaratory judgment. . . .
>
> "The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. . . . Of particular significance on the question before us, the Senate report [S. Rep. No. 1005, 73d Cong., 2d Sess. (1934)] makes it even clearer that the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate. . . .
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> . . . . . .
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> "Much of the hostility to federal injunctions referred to in the Senate report was hostility to their use against state officials seeking to enforce state regulatory statutes carrying criminal sanctions; this was the strong feeling that produced the Three-Judge Court Act in 1910, the Johnson Act of 1934, 28 U. S. C. § 1342, and the Tax Injunction Act of 1937, 28 U. S. C. § 1341. The Federal Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials, except where there was a federal policy against federal adjudication of the class of litigation altogether. . . . Moreover,

the Senate report's clear implication that declaratory relief would have been appropriate in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), both cases involving federal adjudication of the constitutionality of a state statute carrying criminal penalties, and the report's quotation from *Terrace* v. *Thompson*, which also involved anticipatory federal adjudication of the constitutionality of a state criminal statute, make it plain that Congress anticipated that the declaratory judgment procedure would be used by the federal courts to test the constitutionality of state criminal statutes." 401 U. S., at 111–112, 115.[18]

It was this history that formed the backdrop to our decision in *Zwickler* v. *Koota*, 389 U. S. 241 (1967), where a state criminal statute was attacked on grounds

[18] As Professor Borchard, a principal proponent and author of the Federal Declaratory Judgment Act, said in a written statement introduced at the hearings on the Act:

"It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to forego, in the fear of prosecution, the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its unconstitutionality." Hearings on H. R. 5623 before the Subcomm. of the Senate Comm. on the Judiciary, 70th Cong., 1st Sess., 75–76 (1928). See E. Borchard, Declaratory Judgments x–xi (2d ed. 1941).

of unconstitutional overbreadth and no state prosecution was pending against the federal plaintiff. There, we found error in a three-judge District Court's considering, as a single question, the propriety of granting injunctive and declaratory relief. Although we noted that injunctive relief might well be unavailable under principles of equity jurisprudence canvassed in *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), we held "that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U. S., at 254. Only one year ago, we reaffirmed the *Zwickler* v. *Koota* holding in *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973). In those two cases, we declined to decide whether the district courts had properly denied to the federal plaintiffs, against whom no prosecutions were pending, injunctive relief restraining enforcement of the Texas and Georgia criminal abortion statutes; instead, we affirmed the issuance of declaratory judgments of unconstitutionality, anticipating that these would be given effect by state authorities. We said:

> "The Court has recognized that *different considerations* enter into a federal court's decisions as to declaratory relief, on the one hand, and injunctive relief on the other. *Zwickler* v. *Koota*, 389 U. S. 241, 252–255 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965)." 410 U. S., at 166 (emphasis added); see 410 U. S., at 201.

The "different considerations" entering into a decision whether to grant declaratory relief have their origins in the preceding historical summary. First, as Congress recognized in 1934, a declaratory judgment will have a less intrusive effect on the administration of state criminal

laws. As was observed in *Perez* v. *Ledesma*, 401 U. S., at 124–126 (footnote omitted):

"Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear. A state statute may be declared unconstitutional *in toto*—that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad—that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly construed by the state courts it will not be incapable of constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would. Thus, where the highest court of a State has had an opportunity to give a statute regulating expression a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may well be open to a state prosecutor, after the federal court decision, to bring a prosecution under the statute if he reasonably believes that the defendant's conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid

conviction. Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew. Finally, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system. What is clear, however, is that even though a declaratory judgment has 'the force and effect of a final judgment,' 28 U. S. C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." (Footnote omitted.)[19]

Second, engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory

[19] The pending prosecution of petitioner's handbilling companion does not affect petitioner's action for declaratory relief. In *Roe* v. *Wade*, 410 U. S. 113 (1973), while the pending prosecution of Dr. Hallford under the Texas Abortion law was found to render his action for declaratory and injunctive relief impermissible, this did not prevent our granting plaintiff Roe, against whom no action was pending, a declaratory judgment that the statute was unconstitutional. *Id.*, at 125–127, 166–167; see *Lewis* v. *Kugler*, 446 F. 2d 1343, 1349 (1971).

relief available in cases where an injunction would be inappropriate.

> "Were the law to be that a plaintiff could not obtain a declaratory judgment that a local ordinance was unconstitutional when no state prosecution is pending unless he could allege and prove circumstances justifying a federal injunction of an existing state prosecution, the Federal Declaratory Judgment Act would have been *pro tanto* repealed." *Wulp* v. *Corcoran*, 454 F. 2d 826, 832 (1972) (Coffin, J.); see *Perez* v. *Ledesma*, 401 U. S. 82, 116 (separate opinion).

Thus, the Court of Appeals was in error when it ruled that a failure to demonstrate irreparable injury—a traditional prerequisite to injunctive relief, having no equivalent in the law of declaratory judgments, see *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241 (1937); *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933)—precluded the granting of declaratory relief.

The only occasions where this Court has disregarded these "different considerations" and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention into a class of adjudications. See *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943) (federal policy against interfering with the enforcement of state tax laws);[20]

[20] In *Great Lakes Co.* v. *Huffman*, employers sought a declaration that a state unemployment compensation scheme imposing a tax upon them was unconstitutional as applied. Although not relying on the precise terms of 28 U. S. C. § 41 (1), now 28 U. S. C. § 1341, which ousts the district courts of jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," the Court, recognizing the unique

Samuels v. *Mackell, supra.* In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, *e. g., McNeese* v. *Board of Education,* 373 U. S. 668 (1963); *Monroe* v. *Pape,* 365 U. S. 167 (1961). But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.

III

Respondents, however, relying principally upon our decision in *Cameron* v. *Johnson,* 390 U. S. 611 (1968), argue that, although it may be appropriate to issue a declaratory judgment when no state criminal proceeding is pending and the attack is upon the *facial validity* of a state criminal statute, such a step would be improper where, as here, the attack is merely upon the constitutionality of the statute as applied, since the State's interest in unencumbered enforcement of its laws outweighs the minimal federal interest in protecting the

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effects of anticipatory adjudication on tax administration, held that declaratory relief should be withheld when the taxpayer was provided an opportunity to maintain a refund suit after payment of the disputed tax. "In contrast, there is no statutory counterpart of 28 U. S. C. § 1341 applicable to intervention in state criminal prosecutions." *Perez* v. *Ledesma,* 401 U. S., at 128 (separate opinion).

constitutional rights of only a single individual. We reject the argument.

In *Cameron* v. *Johnson*, the appellants sought a declaratory judgment that a Mississippi Anti-Picketing law was an overbroad and vague regulation of protected expression and an injunction restraining *pending* prosecutions against them for violations of the statute. We agreed with the District Court that the statute was not overly broad or vague and that nothing in the record supported appellants' assertion that they were being prosecuted in bad faith. In that circumstance, we held that "[t]he mere possibility of erroneous application of the statute does not amount 'to the irreparable injury necessary to justify a disruption of orderly state proceedings. . . .' The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions." 390 U. S., at 621. Our holding in *Cameron* was thus that the state courts in which prosecutions were already pending would have to be given the first opportunity to correct any misapplication of the state criminal laws; *Cameron* is plainly not authority for the proposition that, in the absence of a pending state proceeding, a federal plaintiff may not seek a declaratory judgment that the state statute is being applied in violation of his constitutional rights.

Indeed, the State's concern with potential interference in the administration of its criminal laws is of lesser dimension when an attack is made upon the constitutionality of a state statute as applied. A declaratory judgment of a lower federal court that a state statute is invalid *in toto*—and therefore incapable of any valid application—or is overbroad or vague—and therefore no person can properly be convicted under the statute until

it is given a narrowing or clarifying construction, see, *e. g., United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971); *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972)—will likely have a more significant potential for disruption of state enforcement policies than a declaration specifying a limited number of impermissible applications of the statute. While the federal interest may be greater when a state statute is attacked on its face, since there exists the potential for eliminating any broad-ranging deterrent effect on would-be actors, see *Dombrowski* v. *Pfister*, 380 U. S. 419 (1965), we do not find this consideration controlling. The solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others.[21]

We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied.[22] The judgment of the Court

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[21] Abstention, a question "entirely separate from the question of granting declaratory or injunctive relief," *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 n. 13 (1972), might be more appropriate when a challenge is made to the state statute as applied, rather than upon its face, since the reach of an uncertain state statute might, in that circumstance, be more susceptible to a limiting or clarifying construction that would avoid the federal constitutional question. Cf. *Zwickler* v. *Koota*, 389 U. S., at 249–252, 254; *Baggett* v. *Bullitt*, 377 U. S. 360, 375–378 (1964).

[22] Some two years after petitioner attempted to handbill at the shopping center, respondent Hudgens, the owner of the center, commenced an action in the Superior Court of Fulton County seeking a declaration of his rights concerning the center's rules against handbilling and related activities. We were advised at oral argument

of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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that the state action had been dismissed by the trial court but that an appeal is pending before the Georgia Supreme Court. Since we do not require petitioner first to seek vindication of his federal rights in a state declaratory judgment action, see *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 510 (1972); *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1970), consideration of abstention by the District Court would be inappropriate unless the action commenced by respondent Hudgens could be shown to present a substantial and immediate possibility of obviating petitioner's federal claim by a decision on state law grounds. Cf. *Askew* v. *Hargrave*, 401 U. S. 476, 478 (1971); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970).

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Richard Guy Steffel, Petitioner, v. John R. Thompson et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 19, 1974]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, concurring.

While joining the opinion of the Court, I add a word by way of emphasis.

Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels "chilled" in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.

As the Court stated in *Younger* v. *Harris*, 401 U. S. 37, 52:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . ."

See also *Boyle* v. *Landry*, 401 U. S. 77, 80-81.

The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated "a genuine threat of enforcement of a disputed

state criminal statute . . . ."* Cases where such a genuine threat" can be demonstrated will, I think, be exceedingly rare.

*See opinion of the Court, *supra*, p. 22. Whether, in view of "recent developments," the controversy is a continuing one, will be for the District Court to determine on remand. See opinion of the Court, *supra*, p. 7.

SUPREME COURT OF THE UNITED STATES

No. 72–5581

Richard Guy Steffel, Petitioner, v. John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 19, 1974]

MR. JUSTICE WHITE, concurring.

I offer the following few words in light of MR. JUSTICE REHNQUIST'S concurrence in which he discusses the impact on a pending federal action of a later filed criminal prosecution against the federal plaintiff, whether a federal court may enjoin a state criminal prosecution under a statute the federal court has earlier declared unconstitutional at the suit of the defendant now being prosecuted, and the question whether that declaratory judgment is *res judicata* in such a later filed state criminal action.

It should be noted, first, that his views on these issues are neither expressly nor impliedly embraced by the Court's opinion filed today. Second, my own tentative views on these questions are somewhat contrary to my Brother's.

At this writing, at least, I would anticipate that a final declaratory judgment entered by a federal court holding particular conduct of the federal plaintiff to be immune on federal constitutional grounds from prosecution under state law should be accorded *res judicata* effect in any later prosecution of that very conduct. There would also, I think, be additional circumstances in which the federal judgment should be considered as more than a mere precedent bearing on the issue before the state court.

Neither can I at this sitting agree that the federal court, having rendered a declaratory judgment in favor of the plaintiff, could not enjoin a later state prosecution for conduct that the federal court has declared immune. The Declaratory Judgments Act itself provides that a "declaration shall have the force and effect of a final judgment or decree," 28 U. S. C. § 2201; eminent authority anticipated declaratory judgments would be *res judicata*, Borchard, Declaratory Judgments 10–11 (2d ed. 1941); and there is every reason for not reducing declaratory judgments to mere advisory opinions. *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941), once expressed the view that § 2283 forbade injunctions against relitigation in state courts of federally decided issues, but the section was then amended to overrule that case, the consequence being that "[i]t is clear that the *Toucey* rule is gone, and that to protect or effectuate its judgment a federal court may enjoin relitigation in the state court." Wright, Law of Federal Courts 180 (2d ed. 1970). I see no more reason here to hold that the federal plaintiff must always rely solely on his plea of *res judicata* in the state courts. The statute provides for "[f]urther necessary or proper relief . . . against any adverse party whose rights have been determined by such judgment," 28 U. S. C. § 2202, and it would not seem improper to enjoin local prosecutors who refuse to observe adverse federal judgments.

Finally, I would think that a federal suit challenging a state criminal statute on federal constitutional grounds could be sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there.

SUPREME COURT OF THE UNITED STATES

No. 72-5581

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[March 19, 1974]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring.

I concur in the opinion of the Court. Although my reading of the legislative history of the Declaratory Judgments Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred, rather than to palliate any controversy arising from *Ex parte Young*, 209 U. S. 123 (1908), Congress apparently was aware at the time it passed the Act that persons threatened with state criminal prosecutions might choose to forego the offending conduct and instead seek a federal declaration of their rights. Use of the declaratory judgment procedure in the circumstances presented by this case seems consistent with that congressional expectation.

If this case were the Court's first opportunity to deal with this area of law, I would be content to let the matter rest there. But as our cases abundantly illustrate, this area of law is in constant litigation, and it is an area through which our decisions have traced a path that may accurately be described as sinuous. Attempting to accommodate the principles of the new declaratory judgement procedure with other more established principles—in particular a proper regard for the relationship between the independent state and federal judiciary systems—this Court has acted both to advance and to

limit the Act. Compare *Aetna Casualty Co.* v. *Haworth*, 300 U. S. 227 (1937), and *Zwickler* v. *Koota*, 389 U. S. 241 (1967), with *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971). Because the opinion today may possibly be read by resourceful counsel as commencing a new and less restrictive curve in this path of adjudication, I feel it is important to emphasize what the opinion does and does not say.

To begin with, it seems appropriate to restate the obvious: the Court's decision today deals only with declaratory relief and with threatened prosecutions. The case provides no authority for the granting of any injunctive relief nor does it provide authority for the granting of any relief at all when prosecutions are pending. The Court quite properly leaves for another day whether the granting of a declaratory judgment by a federal court will have any subsequent *res judicata* effect or will perhaps support the issuance of a later federal injunction. But since possible resolutions of those issues would substantially undercut the principles of federalism reaffirmed in *Younger* v. *Harris*, 401 U. S. 37 (1971), and preserved by the decision today, I feel it appropriate to add a few remarks.

First, the legislative history of the Declaratory Judgments Act and the Court's opinion in this case both recognize that the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.[1]

[1] The Report accompanying the Senate version of the bill stated: "The procedure has been especially useful in avoiding the necessity now so often present, of having to act at one's peril or to act on one's own interpretation of his rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity. . . . Persons now often have to act at their peril, a

There is nothing in the Act's history to suggest that Congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct. Thus I do not believe that a federal plaintiff in a declaratory judgment action can avoid, by the mere filing of a complaint, the principles so firmly expressed in *Samuels, supra.* The plaintiff who continues to violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal law suit. For any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels.*

Second, I do not believe that today's decision can properly be raised to support the issuance of a federal injunction based upon a favorable declaratory judgment.[2] The Court's description of declaratory relief as "a milder alternative to the injunction remedy," *ante,* p. 14, having a "less intrusive effect on the administration of state criminal laws" than an injunction, *ante,* p. 17, indicates to me critical distinctions which make declaratory relief appropriate where injunctive relief would not be. It

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danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights and duties." S. Rep. No. 1005, 73d Cong., 2d Sess., 2–3 (1934).

Petitioner in this case, of course, did cease his handbilling activities after the warning of arrest.

[2] In *Samuels, supra,* 401 U. S., at 72, the Court expressed con that a declaratory judgment issued while a state prosecution was pending "might serve as the basis for a subsequent injunction against those proceedings . . . ." The Court recognized that this chain of litigation would "result in a clearly improper interference with the state proceedings." *Ibid.* As discussed, *infra,* I believe that such improper interference would be present even though the declaratory judgment itself were issued prior to the time of the federal plaintiff's arrest.

would all but totally obscure these important distinctions if a successful application for declaratory relief came to be regarded, not as the conclusion of a lawsuit, but as a giant step towards obtaining an injunction against a subsequent criminal prosecution. The availability of injunctive relief must be considered with an eye toward the important policies of federalism which this Court has often recognized.

If the rationale of cases such as *Younger* and *Samuels* turned in any way upon the relative ease with which a federal district court could reach a conclusion about the constitutionality of a challenged state statute, a pre-existing judgment declaring the statute unconstitutional as applied to a particular plaintiff would of course be a factor favoring the issuance of an injunction as "further relief" under the Declaratory Judgments Act. But, except for statutes that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph . . . ," *Younger* v. *Harris*, *supra*, 401 U. S., at 53, the rationale of those cases has no such basis. Their direction that federal courts not interfere with state prosecutions does not vary depending on the closeness of the constitutional issue or on the degree of confidence which the federal court possesses in the correctness of its conclusions on the constitutional point. Those decisions instead depend upon considerations relevant to the harmonious operation of separate federal and state court systems, with a special regard for the state's interest in enforcing its own criminal laws, considerations which are as relevant in guiding the action of a federal court which has previously issued a declaratory judgment as they are in guiding the action of one which has not. While the result may be that injunctive relief is not available as "further relief" under the Declaratory Judgments Act in this particular class of cases whereas it would be in similar cases not involving con-

siderations of federalism, this would be no more a *pro tanto* repeal of that provision of the Declaratory Judgments Act than was *Younger* a *pro tanto* repeal of the All Writs Act, 28 U. S. C. § 1651.

A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions. State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties. If the federal plaintiff pursues the conduct for which he was previously threatened with arrest and is in fact arrested, he may not return the controversy to federal court, although he may of course raise the federal declaratory judgment in the state court for whatever value it may prove to have.[3] In any event, the defendant at that point is able to present his case for full consideration by a state court charged, as are the federal courts, to preserve the defendant's constitutional rights. Federal interference with this process would involve precisely the same concerns discussed in *Younger* and recited in the Court's opinion in this case.[4]

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[3] The Court's opinion notes that the possible *res judicata* effect of a federal declaratory judgment in a subsequent state court prosecution is a question "not free from difficulty." *Ante*, p. 18. I express no opinion on that issue here. However, I do note that the federal decision would not be accorded the *stare decisis* effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might of course be viewed as highly persuasive.

[4] The Court's opinion says:

"Sensitive to principles of equity, comity, and federalism, we recognized in *Younger* v. *Harris*, *supra*, that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions. We were cognizant that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that cir-

Third, attempts to circumvent *Younger* by claiming that enforcement of a statute declared unconstitutional by a federal court is *per se* evidence of bad faith should not find support in the Court's decision in this case. As the Court notes, quoting my Brother BRENNAN's opinion in *Perez* v. *Ledesma*, 401 U. S. 82, 124–126:

> "The persuasive force of the [federal] court's opinion *may* lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction *may* be changed, or the legislature *may* repeal the statute and start anew." (Emphasis added.)

This language clearly recognizes that continued belief in the constitutionality of the statute by state prosecutorial officials would not commonly be indicative of bad faith and that such allegations, in the absence of highly unusual circumstances, would not justify a federal court's departure from the general principles of restraint discussed in *Younger*.

If the declaratory judgment remains, as I think the Declaratory Judgments Act intended, a simple declaration of rights without more, it will not be used merely as a dramatic tactical maneuver on the part of any state defendant seeking extended delays. Nor will it force state officials to try cases time after time, first in the federal courts and then in the state courts. I do not believe Congress desired such unnecessary results, and I do not think that todays decision should be read to

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cumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . .' *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884)." *Ante*, at p. 8.

sanction them. Rather the Act, and the decision, stand for the sensible proposition that both a potential state defendant, threatened with prosecution but not charged, and the State itself, confronted by a possible violation of its criminal laws, may benefit from a procedure which provides for a declaration of rights without activation of the criminal process. If the federal court finds that the threatened prosecution would depend upon a statute it judges unconstitutional, the State may decide to forego prosecution of similar conduct in the future, believing the judgment persuasive. Should the state prosecutors not find the decision persuasive enough to justify forbearance, the successful federal plaintiff will at least be able to bolster his allegations of unconstitutionality in the state trial with a decision of the federal district court in the immediate locality. The state courts may find the reasoning convincing even though the prosecutors did not. Finally, of course, the state legislature may decide, on the basis of the federal decision, that the statute would be better amended or repealed. All these possible avenues of relief would be reached voluntarily by the States and would be completely consistent with the concepts of federalism discussed above. Other more intrusive forms of relief should not be routinely available.

These considerations should prove highly significant in reaching future decisions based upon the decision rendered today. For the present it is enough to say, as the Court does, that petitioner, if he successfully establishes the existence of a continuing controversy on remand, may maintain an action for a declaratory judgment in the District Court.